

NOT REPORTABLE

**IN THE EASTERN CAPE HIGH COURT
BHISHO**

CASE NO. C A & R 8/12

In the matter between:

JACKSON SKAPU

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

HARTLE J:

1. The appellant was convicted by the regional court, Mdantsane, of dealing in dagga in contravention of section 5(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992 (“the Act”) and sentenced to five years’ imprisonment.

2. He appeals against both conviction and sentence.

3. On conviction the grounds of appeal are in essence that the trial court erred in accepting the state's evidence and rejecting the appellant's explanation that he was unaware of the presence of dagga found in his motor vehicle upon his arrest.

4. The charge was that on 19 July 2010, and at a Sasol garage in Mdantsane, he unlawfully dealt in an undesirable dependence producing substance *to wit* "*four half bags (of dagga) weighing 98.75kg*", alternatively that he possessed it.

5. He pleaded not guilty to the main and the alternative counts. He claimed that the dagga found in the back of his vehicle by the police did not belong to him, but to a friend who had borrowed his vehicle. He had no knowledge thereof and denied that he was dealing with it.

6. Apart from the formal evidence concerning the analysis of substance samples, the state relied on the evidence of two experienced police officers. Warrant Officer *Mbebo* testified that on the day in question he received a tip off that a dagga carrying vehicle would be filling up with petrol at the Sasol garage *en route* to Dimbaza. He expected a grey canopied Toyota Legend 40 bakkie with registration letters and numbers FKX 033EC. He elicited the assistance of his colleagues and waited near the garage for the vehicle. They parked near the robots approximately 100 metres away. They were three officers in two vehicles, but he and Warrant Officer *Xolisile Hlulani* were together in one vehicle. At approximately 7pm they observed the anticipated vehicle moving into the garage and immediately driving off again without stopping for fuel. The vehicle drove in the direction of Fort Jackson. They followed it - he and *Hlulani* in an unmarked vehicle bearing a blue lamp and siren which they

activated, and pulled the vehicle off at a nearby T-junction. The vehicle turned out to be driven by the appellant who was alone at the time.

7. *Mbebo* showed the appellant his appointment certificate, told him the reason for stopping him and asked for permission to search the vehicle. The appellant got out and when *Mbebo* asked him to open the canopy he said that they should “*negotiate*” or speak. His rights had already been explained to him and he was again reminded of his right to remain silent. He was handcuffed and, when the unlocked canopy was opened, the witness discovered four half hessian bags of dagga and another plastic bag not quite full. He was struck by the smell of the odour of the grass which had been recently cut and knew it to be dagga. The appellant was arrested. He was not asked for any explanation, neither did he give any. He also had a passport and money totalling R6 810.00 in the vehicle together with Absa bank slips which gave the impression that he had just withdrawn the cash. The dagga was weighed the following day in the appellant’s presence and its value estimated by *Mbebo* to be in the sum of R98 000.00. The latter took samples from the bags which were sent for analysis, later positively found to be *cannabis*.

8. *Hlulani*, who also testified, corroborated *Mbebo* as to the happenings of that night, the only difference being that he personally did not observe the approach of the appellant’s vehicle when it entered the garage. He only saw it upon its exit when it was pointed out to him by his colleague.

9. The appellant on the other hand testified that he had lent his bakkie to a friend, *Bongani Naidoo*, who had failed to return it to him as agreed. On 19 July 2010 he was in Queenstown where he lives when the friend called to say he should come and collect his vehicle at the garage which he directed him to. He took a taxi to King William’s Town and another from there to Mdantsane where

he waited a while for *Bongani* to turn up. The latter ultimately arrived in two vehicles. It was already dark. He demanded his keys from him and he responded in an angry manner that he'd left them in the ignition. He found his vehicle's motor running and left immediately. He hadn't gone far when he was stopped by armed persons who he suspected to be "*tsotsis*". Only later did he realise from the blue lamp flashing that these were police officers, whereupon he opened the door. He claims that he was pulled from the vehicle and assaulted. The dagga was then discovered in the back of the vehicle which he saw for the first time when it was pointed out to him. He surmises that it was *Bongani* who had set him up by phoning the police and leading him to be arrested. The police did not want to hear his innocent explanation involving *Bongani* and again assaulted him.

10. The state witnesses made a favourable impression on the trial court. The magistrate found that there were no improbabilities in their evidence and that they corroborated each other. Most critically *Mbebo* was emphatic that the appellant's vehicle did not stop at the garage and that nobody alighted from it. This was corroborated by *Hlulani*. The court thus rejected the appellant's version that he had just taken repossession of his motor vehicle under the circumstances testified to by him. In the magistrate's view there was no room for finding that *Bongani* was on the scene or that the appellant's vehicle had just before been returned to him at the garage.

11. The appellant relies heavily on the contention that the trial court erred in finding that the state witnesses' corroborated each other in material respects especially around the issue of whether the appellant's vehicle stopped or not at the garage, since *Hlulani* had not seen it entering but only leaving the garage. This aspect was critical to the appellant's version that he had unwittingly taken repossession of his motor vehicle stashed with dagga.

12. In my view however the appellant's reliance on this supposed misdirection of the magistrate is misplaced. *Mbebo* testified that the appellant's vehicle drove into the garage, did not fill with petrol but "*it just went through and got out*". He confirmed that he did not see anyone alighting from the vehicle or the car being filled with petrol. At the time he made his observations he was standing near the robot and although it was dark, there was light at the garage. As a result he could see clearly His focus was moreover pertinently on the vehicle at all times, so he said, as he did not want anything to distract or confuse him.

13. *Hlulani's* testimony relevant to this aspect is recorded as follows in the transcript:

‘ Can you tell us what happened there on that day which brought you here today? --- Warrant officer Mbebo had the information.

COURT: Yes. --- That there would be a bakkie from Mdantsane to Dimbaza.

PROSECUTOR: Proceed sir. --- We were told that it was FKX033EC, a long base.

Yes, sir. --- Warrant officer told us that this bakkie would fill petrol at Sasol Garage. We waited for it.

Proceed. --- He did not fill petrol, (he)¹ stopped it near the old police station – Fort Jackson police station.

Proceed. --- We were in two cars.

Yes, sir. --- Warrant officer Mbebo alighted to the accused.

Proceed sir. --- He took out an appointment certificate, showed it to him, introducing ourselves that we are police and told him why we were stopping him.’

¹ This must in my view be a reference to themselves and not the appellant because it was the police officers who stopped his vehicle. Appellant's counsel misunderstood this statement to mean that the appellant's vehicle stopped, to bring it in conformity with the defence's case. However, the only stopping which happened near the Fort Jackson police station was when the appellant was pulled off there by the police. This is confirmed by *Hlulani* narrating a few lines below that they told the appellant why they were stopping him.

14. Evidently there was a misunderstanding during cross examination between the appellant's legal representative and *Hlulani* in distinguishing between the police vehicle and the appellant's. In this regard the transcript reveals the following:

' How long did the car stand at the petrol station when you were watching this vehicle? --- I didn't calculate the time, I wouldn't know how long it stood there.²

So the bakkie did stand at the garage?³ --- It was shown to me by warrant officer at the time he was getting out of the garage.

So you didn't see the bakkie entering the garage. --- No.

So you don't know if an exchange was done, if someone got out and then the accused got in? --- No one arrived there.

How far were you standing with Warrant officer Mbebo, what was the distance from the garage? --- Not too far.

So you could see clearly what was going on at the garge? --- Very much.

So if you could see what was going on, how come you didn't see the exchange being done with regard to the person getting out of and the owner getting into the bakkie? – No one alighted from the car.

But you say the car was stationary there. --- Ours?⁴

No, the accused's vehicle. --- It got in and got out.

But you just stated that it was stationary for a while. --- It got into the garage and then it got out.'

15. Evident from the exchange above is the witness *Hlulani*'s confirmation that although he did not see the appellant's bakkie entering the garage, there was no lapse of time for the appellant's version to have even the slightest possibility of being reasonably possibly true. *Hlulani* twice confirms in the passage above that the vehicle entered, albeit he did not see it at that point, and

² Appellant's counsel understood this reply to confirm that the appellant's vehicle "stood there", but *Hlulani* was clearly referring to the vehicle from which they observed the appellant. This is clarified in the text below.

³ This is a reference to the appellant's vehicle again.

⁴ This confirms the witnesses' understanding that the only car stationary was theirs.

left instantaneously. Further no other person arrived there and no one alighted from the motor vehicle.

16. In the result the appellant's reliance on *Hlulani's* lack of observation of the vehicle entering does not create doubt as to the guilt of the appellant as contended for and there is no basis to support the so-called material misdirection attributed to the magistrate in accepting the state's testimony in this regard. This seems to me to be one of those instances where it can be said that the quality and weight of the state's case is so persuasive that the trial court was correctly compelled to eliminate the possibility that the version proffered by the appellant that he was an unwitting carrier of the dagga might be reasonably possibly true.

17. Although not foreshadowed in the notice of application for leave to appeal, in the appellant's initial heads of arguments⁵ it was submitted that the state had failed to prove beyond reasonable doubt that he dealt in dagga and that he should, at most, have been convicted of possession of dagga. This was not an argument Mr *Schuring* on behalf of the appellant had much confidence in, but it was a concern raised *mero motu* by the court.

18. The magistrate dealt with this aspect very fleetingly in his judgment as follows:

'The only conclusion that I can come to on the evidence placed before me, is that the accused intended or possessed the dagga for the purpose of dealing with it. 98.75kg is just too much to possess for own personal use. The only conclusion that I can come to on the evidence is that he possessed it for the purposes to deal with it. I therefore CONVICT the accused on the main count, as charged.'

⁵ These were drafted by Ms *Renou* who initially appeared for the appellant.

19. “*Deal in*” is defined in the Act as follows:

‘ “**deal in**”, in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug;’

20. Section 21(1)(a)(i) of the Act provides that:

‘(1) If in the prosecution of any person for an offence referred to-

(a) in section 13(f) it is proved that the accused -

(i) was found in possession of dagga exceeding 115 grams.

(ii) ...

(iii) ...

it shall be presumed, until the contrary is proved, that the accused dealt with such dagga or substance.’

21. Section 13(f) of the Act refers in turn to a contravention of section 5(b), which is a charge of dealing in any dangerous or undesirable dependence-producing substance respectively.

22. Notwithstanding what still appears in the text of the Act, in *S v Bhulwana, S v Gwadiso*⁶ the Constitutional Court with effect from the date of its judgment⁷ declared the provisions of section 21(1)(a)(i) to be inconsistent with the right entrenched in section 25(3)(c) of the Interim Constitution, invalid and of no force and effect. The section 25(3)(c) right referred to in the Interim Constitution is set out in virtually the same words in section 35(3)(h) of the 1996 Constitution.⁸

⁶ 1996 (1) SA 338 (CC).

⁷ 29 November 2005.

⁸ All the remaining presumptions in section 21 (relating to dealing in drugs) and section 20 (relating to possession of drugs) have suffered a similar fate. See in this regard *S v Ntsele* 1997 (2) SACR 740 (CC), *S v Mjezu* 1996 (2) SACR 594 (NC), *S v Manyonyo* 1999 (12) BCLR 1438 CC and *S v Mello and Another* 1998 (3) SA 172 (CC). See too GN R585 in GG21266 of 15 June 2000 re the declaration of invalidity of section 21(1)(c) of the Act.

23. This notwithstanding, where the inference that an accused dealt with dagga is justified on the proved facts according to the well known guidelines stated in *R v Blom*⁹, a conviction on this basis can be sustained. *Lombard J* endorsed such an approach in *S v Mathe*¹⁰ with particular reference to a *dictum* in *S v Bhulwana supra* to this effect:

‘Wat in omstandighede soos die onderhawige nie uit die oog moet verloor nie, is dat ten einde aan handeldryf in dagga skuldig bevind te kan word, daar nie van die Staat vereis word om te alle tye bo redelike twyfel te bewys dat daar inderdaad handel gedryf is soos deur die Wet vereis nie. Die feit dat sekere vermoedens hieromtrent weggeval het, beteken nie dat basiese regsbeginsels en gesonde verstand ook in die slag gebly het nie.

Waar ‘n person in besit van ‘n groot hoeveelheid dagga gevind word en daar word geen redelike aanvaarbare verduideliking vir sodanige besit deur hom of haar verskaf nie kan die afleiding redelikerwys gemaak word dat so ‘n person daarin handel gedryf het soos deur die Wet omskryf.

‘If an accused is found to have been in possession of a large quantity of dagga, it might, depending on all the circumstances and in the absence of an explanation giving rise to a reasonable doubt, be sufficient circumstantial evidence of dealing and a justification for the imposition of a higher penalty.’

S v Bhulwana; S v Gwadiso (supra op 396G-H).

‘The large quantity of dagga which he had in his possession, coupled with his demonstrably false denial of possession and the absence of any plausible alternative suggestion from him as to why it was in his possession, fully justify the inference that he was engaged in dealing in dagga within the meaning of the relevant statute. Indeed, he conceded himself in cross-examination that anyone possessing so large a quantity of dagga would obviously intend to sell it. The fact that the magistrate relied upon the presumption in convicting the appellant is immaterial to the result. The

⁹ 1939 AD 188 at 202 – 3.

¹⁰ 1998 (2) SACR 225 (O) at 229a.

evidence proved beyond reasonable doubt that the appellant was in possession of this large quantity of dagga, far more than could reasonably have been intended for his own use, and that his denial that he was in possession of it was false. Even without resort to the statutory presumption, the inference that he intended to deal in it was the only reasonable inference which could have been drawn in the circumstances.’

per Marais R (soos hy toe was) in S v Sixaxeni 1994 (2) SASV 451 (K) at 455 g–j.’

24. Applying these principles to the facts the court concluded that the inference was inescapable that the appellant in that matter was dealing in the 131kg of dagga, in the manner defined in the Act.

25. The question in *casu* therefore is whether dealing could correctly be inferred from the proved facts.

26. However tempting it is to conclude, as the trial court did, that the quantity of the dagga was far too great to possess for his own personal use, I am not satisfied that the inference that the appellant was necessarily engaged in dealing with the dagga is the only one to be properly drawn in the circumstances.

27. Although there is some indication that the magistrate applied inferential reasoning he leaned too readily in my view to the conclusion which he did based on the vast quantity of dagga found without reference to any positive proved facts from which the inference could be made. As it is, the fact of the appellant’s possession of the dagga was a conclusion drawn, properly in my view, from all the circumstances and the manner in which the appellant conducted himself at the time of his arrest. The further difficulty is that, on the state’s version, the accused was not asked for an explanation at all and the cash found in his possession was evidently withdrawn from the bank as supported by the Absa bank slips found. The possibility remains too that the appellant merely

transported the dagga as a courier. This therefore leaves open other reasonable inferences which cannot categorically be excluded from the facts.

28. In the result the appellant ought to be given the benefit of the doubt that he necessarily was engaged in dealing with the dagga as defined in the Act.

29. In the premises it appears apposite to set aside the conviction of dealing and to substitute it with a conviction of possession of dagga.

30. The next issue for consideration is what is an appropriate sentence to be imposed. Even in respect of a contravention of section 4(b) of the Act the possible penalties are extremely severe. Section 17(d) invites the imposition of such fine as the court may deem fit to impose, or imprisonment for a period not exceeding fifteen years, or to both such fine and such imprisonment.

31. The appellant is in his sixties, unmarried and supports eight children, the youngest of whom is not yet school going. The children's mother is unemployed. He is a welder by profession, conducting business under the auspices of a registered company.

32. He has two relevant hefty previous convictions for dealing in dagga committed on 15 December 2003 and 18 July 2007 respectively, neither of which seem to have deterred him from repeat contraventions. In both cases the sentences were partially suspended allowing him to be the master of his own rehabilitation, opportunities which he appears to have spurned and which unfortunately reflect a lack of remorse on his part. This was evident too from the manner in which he conducted himself upon trial. The quantity of dagga involved is also not negligible and on its own warrants a more censorious penalty although this court should be wary of attributing too much of consequence to it so as to inadvertently treat him as a dealer whereas the

substituted conviction is for possession only. The prevalence of the offence is also a factor in aggravation.

33. In my view a suspended sentence plus a fine with the alternative of punishment would be an appropriate sentence.

34. In the result I issue the following order:

1. The conviction and sentence of the appellant are set aside and substituted as follows:

“1. The accused is convicted of contravening section 4(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992; and

2. The accused is sentenced to three (3) years imprisonment which is suspended for a period of five (5) years on condition that he is not convicted of contravening section 4(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992 committed during the period of suspension, plus a fine of R10 000.00 or eighteen (18) months imprisonment.”

HARTLE J

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:

EBRAHIM J

JUDGE OF THE HIGH COURT

DATE OF APPEAL : 14 September 2012

DATE OF JUDGMENT: 17 October 2012

Appearances:

For appellant: Mr C Schuring instructed by Zepe & Company, 34 Prince Alfred Street, Queenstown

For respondent: Mr Coltman, Office of the Director of Public Prosecutions, Bhisho