

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 318/2011

In the review between:-

THE STATE

and

PATRIC TSHIDISO THAMAE

Accused Three

SIAS MOKHETHI HAMLAM

Accused Four

PASEKA PITSO

Accused Five

CORAM:

KRUGER *et* C.J. MUSI, JJ

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

10 NOVEMBER 2011

- [1] This is a judgment on review. Five accused were arraigned before the magistrates' court at Ficksburg. On 5 July 2011 all charges were withdrawn against accused numbers 1 and 2. Accused numbers 3, 4 and 5 were charged as follows:

Accused No. 3: Patric Tshidiso Thamae

Count 1: Contravention of section 5(b) Act 140 of 1992.

Dealing in dagga: 30 kg on 2 July 2011 on R26

Road, Ficksburg.

Count 2: Contravention of section 49(1)(a) Act 13 of 2002.
Illegal foreigner in the Republic on 2 July 2011 on
R26 Road, Ficksburg.

Accused No. 4: Sias Mokhethi Hamla

Count 3: Contravening of section 5(b) Act 140 of 1992.
Dealing in dagga: 16,6 kg on 2 July 2011 on R26
Road, Ficksburg.

Count 4: Contravention of section 49(1)(a) Act 13 of 2002.
Illegal foreigner in the Republic on 2 July 2011 on
R26 Road, Ficksburg.

Accused No. 5: Paseka Pitso

Count 5: Contravention of section 5(b) Act 140 of 1992.
Dealing in dagga: 21,9 kg on 2 July 2011 on R26
Road, Ficksburg.

Count 6: Contravention of section 49(1)(a) Act 13 of 2002.
Illegal foreigner in the Republic on 2 July 2011 on
R26 Road, Ficksburg.

[2] Each of the three accused pleaded guilty to the charges

against that particular accused, and each accused was so convicted. Accused number 3 was sentenced to R3 500,00 or three years imprisonment on count 1, and given a fine of R200,00 or 30 days imprisonment on count 2. Accused number 4 was given a fine of R2 000,00 or 18 months imprisonment on count 3, and on count 4 a fine of R200,00 or 30 days imprisonment. Accused number 5 was sentenced to a fine of R2 500,00 or 18 months imprisonment on count 5. On count 6 he was given a fine of R200,00 or 30 days imprisonment. On the charges of dealing in dagga (counts 1, 3 and 5) each accused also got a period of suspended imprisonment. There is nothing wrong with the sentences.

[3] The only common denominator in the charges is that they were all committed on the R26 Road, Ficksburg, on 2 July 2011. Accused numbers 3, 4 and 5 all carried different quantities of dagga.

[4] I asked the magistrate whether it was correct to charge accused numbers 3, 4 and 5 together and whether section 156 of the Criminal Procedure Act 51 of 1977 or any other law allows such procedure. Section 156 reads as follows:

“Any number of persons charged in respect of separate offences committed at the same place and at the same time or about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons.”

- [5] The magistrate in his reply says all three accused were charged with similar but separate offences. The magistrate points out that the prosecutor in this case did not inform the court that the evidence admissible at the trial of one accused will also be admissible as evidence at the trial of any other accused, as stipulated in section 156.

I agree that the information by the prosecutor is not essential and that the absence of such information does not vitiate the proceedings.

- [6] The magistrate says the only difference in the offences committed by the accused was the varying weight of the dagga. They were not prejudiced, he says.

- [7] As to whether the same transaction, as contemplated in **S v RAMGOBIN AND OTHERS** 1986 (1) SA 68 (N) applies in respect of all three accused, the magistrate submits that the accused “committed the same ‘transaction’ i.e. dealing in dagga but to different extents”. The magistrate understands “transaction” to be the act or conduct in the criminal law sense of the word. In his view, if I understand his argument correctly, the “transaction” contemplated in **CHANG WING, LEONG SOO AND DADA GIA v REX** 1905 TS 767; **R v ADAMS AND OTHERS** 1959 (1) SA 646 (Special Criminal Court) at 666 C – D; **S v RAMGOBIN AND OTHERS**, *supra* at 74 F – J means the offence. Innes CJ in the **CHANG WING**-case, *supra*, describes “transaction” in relation to the same set of facts (at 768 top). If the magistrate’s contention that “transaction” refers to the offence is correct, it would mean that 200 drunken drivers apprehended at a road block on one day, could be charged in one charge sheet. That is not the intention of section 156. **S v Adams** relied upon by the magistrate related to charges of treason involving 91 accused. Different considerations might be relevant when dealing with treason as opposed to dealing in dagga, because in a treason charge there might be various acts

performed over a period of time.

- [8] The joinder of the three accused in this case was irregular. However, they did not object and there was no prejudice to them. As Ramsbottom AJP said in **DAVID AND OTHERS v VAN NIEKERK, NO AND ANOTHER** 1958 (3) SA 82 (T) at 90 D:

“If the accused do not object, and if there is no prejudice, the irregularity may not be fatal, but still it is an irregularity.”

It would not be in the interests of justice to interfere with the convictions and sentences in these circumstances. The practice to join all accused arrested at the same “road block” should be discouraged.

- [9] The magistrate raises two further reasons why in his view the convictions are not in order. They are the amendment of certain sections of Act 13 of 2002, and a duplication of convictions.

- [10] The accused were charged under section 49(1)(a) of the

Immigration Act 13 of 2002 which has, according to the magistrate, been repealed. Act 19 of 2004, to which the magistrate refers, is the Immigration Amendment Act which came into operation on 1 July 2005. Section 45 of Act 19 of 2004 substitutes section 49(1) of Act 13 of 2002. The magistrate incorrectly refers to Act 13 of 2002 as the “old” Immigration Act. Act 13 of 2002 was not repealed but amended by the Immigration Amendment Act 19 of 2004. The accused committed the offences on 2 July 2011 and were charged under section 49(1)(a) and the rest of Act 13 of 2002 as those provisions read at that time. For the sake of clarity the charge ought to indicate that section 49(1)(a) has been substituted by section 45 of Act 19 of 2004. That charge was in accordance with law.

- [11] As to the magistrate’s concern about duplication of convictions, he refers to an unreported Western Cape High Court case where the court held that assault committed in the course of an escape from lawful custody was a duplication with the charge of escaping. The magistrate says that the accused entered the Republic with the intent to deal in dagga and there was a splitting of charges, and he says

the convictions under Act 13 of 2002 in relation to entering the Republic are bad in law and ought to be set aside.

[12] Two practical aids are used to decide whether there has been a duplication of charges. There is no universally valid criterion. The facts of the case guide the court as to which test to apply. (**S v BENJAMIN EN 'N ANDER** 1980 (1) SA 950 (A) at 956 E – H) On the facts of this case the “evidence” test should be applied. The offences of dealing in dagga and entering the Republic are distinct. Once in the Republic, the accused could have done anything and their intent is not a determining factor. The magistrate refers to the escaping case where the assaults formed part of the escape. In the present case the accused had to enter the Republic to deal in dagga here, but the criminalising statutes have different aims and requirements. There was no improper duplication of convictions.

[13] There is no basis to interfere with these convictions. Although there was improper joinder, there was no prejudice to the accused.

ORDER

[14] The convictions and sentences of all three accused are confirmed.

A. KRUGER

I agree.

C.J. MUSI, J

/sp