

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape, Kimberley)**

Case Nr: CA & R 59/09
Case Heard: 09/11/2009
Date Delivered: 13/11/2009

In the matter:

SIVUYILE VYFER

Appellant

versus

THE STATE

Respondent

Coram: Kgomo JP et Mjali AJ

JUDGMENT ON APPEAL

KGOMO JP:

- [1] The appellant is a 27 year old unmarried male prison warden who was deployed to the Juvenile Section of the Kimberley Correctional Services facility. He was arraigned on a charge of the unlawful possession of dagga (cannabis) in contravention of s4(b) of the Drugs and Drug Trafficking Act, 140 of 1992. He was legally represented by a privately funded attorney, Mr Ntuli. He pleaded not guilty and proffered in plea-explanation (s115 of the Criminal Procedure Act, 51 of 1977 ("the

CPA”) that the Cannabis (0,58kg) was located in his togbag, slung over his back, but that he was unaware of its existence.

- [2] Notwithstanding his protestation of innocence the appellant was convicted of the illegal possession of the prohibited substance and sentenced to serve one year imprisonment; with no portion suspended and without the option of a fine. The appeal to this Court is with the leave of the Court a quo (the trial court) against the sentence only. It need be mentioned that at the inception of the trial the State specifically abandoned the main charge relating to dealing in drugs which charge was consequently not put to the appellant.
- [3] The evidence, adduced through several prison warders, established beyond a shadow of doubt that the togbag was used as a decoy, whereas the cannabis was stashed in appellant’s trouser pockets. With this stuff was discovered several little plastic bags with which pharmacies and medical practitioners dispense tablets. The implication is evidently that the tablet-pockets were meant for packaging and distribution to the inmates, predominantly, if not exclusively juveniles. This is seriously aggravating.

- [4] Also aggravating is that the appellant was in a position of trust and in a privileged position, having been in secure and gainful employment whereas upwards of 30% of the employable South African populace are unemployed and job-hunting. This position of trust he has now betrayed, with some dire consequences for his future employability. The underlined phrase counts as a mitigating feature.
- [5] At 27 years of age, with a long future ahead, the appellant is a first offender. He has a common law wife with whom he has two minor children. He also has a third child with another woman. He maintains all these dependants.
- [6] The Magistrate cannot be faulted, as Adv I J Nel for the appellant submitted that we ought to, for holding it against the appellant that he showed no remorse. He did not. On the contrary he was caught red-handed and in a foolhardy manner implicated an innocent third party falsely. The Magistrate was fully entitled to draw an adverse inference against appellant in light of these factors. A constitutional right to remain silent must not be placed on par with an accused person giving false testimony.

- [7] On a conspectus of all the information at our disposal it is my view that the mitigating factors and the appellant's personal circumstances are weighty enough to have persuaded the Magistrate to incline towards keeping the appellant out of jail. I can't see how he will succeed in retaining his job. This in itself will affect him and his dependants adversely and imprisonment will not benefit him, his dependants, the State or the community at large. On this basis we will interfere and assess sentence afresh mindful of what was said in **S v De Jager and Another** 1965(2) SA 616 (A) at 628H – 629B.
- [8] The appellant is out on R3000-00 bail. This could be paid towards a fine, but R3000-00 will not reflect the moral turpitude of this serious crime sufficiently. R6000-00 or six month's imprisonment and a further six months imprisonment would be more appropriate.
- [9] I draw attention to the cavalier attention, if attention that be, that was paid by the Clerk of the Kimberley District Court to the "Cover Sheet for Appeals Cases (J111)", a legal document. The various columns are incorrectly completed and are misleading. In the column "Appears in Person" the block "yes" was ticked. The appellant enjoyed legal representation throughout and even his papers were so prepared. The bail receipt

shows that he was admitted to bail on 26 March 2009. The Cover Sheet bears the Clerk of the Court's date stamp of 13 July 2009. This shows utter nonchalance on the part of this official because he thumb-sucked. However, in terms of the Rules of Court it is the appellant's attorney who bears ultimate responsibility to see to it that the record is in order. This should not be repeated. The Chief Magistrate must be made aware.

[10] **In the result I make the following order:**

1. The appeal succeeds to the following extent. The sentence of 12 (twelve) months imprisonment is set aside and substituted with the following:
 "The accused is sentenced to pay a fine of R6000-00 (six thousand rand) or in default of payment to undergo 6 (six) months imprisonment. He is in addition sentenced to 6 (six) months imprisonment which is suspended for four years on condition that he is not convicted of the contravention of s4(b) (possession of drugs) or s5(b) (dealing in drugs) of the Drugs and Drug Trafficking Act, Act 140 of 1992, committed during the period of suspension."
2. Three thousand rand (R3000-00) of the fine must be paid within seven (7) days of the date hereof

and the balance in the sum of three thousand
(R3000-00) is deferred to 15 December 2009.

F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

G N Z MJALI
ACTING JUDGE
NORTHERN CAPE DIVISION

For Appellant :
On Behalf of:

Adv I J Nel
ANDRÉ POTGIETER AND ASSOCIATES

For the Respondent:
On behalf of:

Adv K M Kgatwe
DIRECTOR OF PUBLIC
PROSECUTIONS, KIMBERLEY