

127/96

Case No 152/96

**IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)**

In the matter between

VIJAY DAYA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: Vivier, Howie et Plewman JJA

HEARD: 12 November 1996

DELIVERED: 12 November 1996

TRANSCRIPT OF REASONS ORALLY DELIVERED IN OPEN
COURT ON TUESDAY 12 NOVEMBER 1996 BY VIVIER JA AND
CONCURRED IN BY HOWIE JA AND PLEWMAN JA.

VIVIER JA:

On 22 January 1993 the appellant and one Ayub Khan were each found in possession of 300 Mandrax tablets containing methaqualone at the International Airport in Durban, having just arrived from Cape Town. They were arrested and at their subsequent trial they each pleaded guilty to the alternative charge of the unlawful possession of 300 Mandrax tablets. The appellant was sentenced to three years' imprisonment and Khan to a fine of R4 000 or twelve months' imprisonment. The appellant's appeal against his sentence to the Natal Provincial Division succeeded to the extent that one half of the period of imprisonment was conditionally suspended for five years. With the leave of the Court *a quo* the appellant appeals to this Court against his sentence.

The appellant is 36 years old. He is married and supports his wife and six minor children. He passed standard four at

school. He told the trial Court that he was self-employed and earned an income of about R1 200 a month by selling children's clothing from his home.

The appellant further told the trial Court that he had purchased the 300 Mandrax tablets in Cape Town for his own personal use. After the last of his previous convictions for the possession of drugs in 1985 he had voluntarily and without assistance given up taking drugs. His mother died during 1992 and the shock of her death caused him sleeplessness so that for a few months after her death he took two Mandrax tablets every night to help him sleep. The Mandrax tablets in question had been acquired for this purpose. After his arrest in January 1993 he had once again stopped using Mandrax and had not used any drugs since. He denied that he was addicted to drugs.

The appellant admitted five previous convictions for the

unlawful possession of drugs, of which four were for possessing dagga and one for possessing Mandrax. In addition he had two previous convictions for assault, one with a knife and one with an iron pipe and two previous convictions for the unlawful possession of a firearm and ammunition respectively. His first conviction involving drugs was during 1980 when he was given a suspended sentence for the possession of dagga. The next year and within the period of suspension he was again convicted for the possession of dagga and again given a suspended sentence. In 1983, still within the previous two periods of suspension, he was convicted of being in possession of Mandrax and dagga. These two convictions were taken as one for purposes of sentence and he was sentenced to six months' imprisonment, the whole of which was once again suspended for four years. In 1985 he was convicted of being in possession of dagga and was sentenced to twelve months'

imprisonment, the whole of which was suspended for five years. One of the conditions of suspension of the last-mentioned sentence was that the appellant receive treatment at SANCA as directed by a probation officer. The evidence at the present trial was that the appellant duly reported to the probation officer in question but was never treated due to an administrative mistake for which he was not in any way to blame.

A probation officer, Miss Singh, who was called by the trial Court, said that the appellant was not addicted to drugs and that he had the ability to abstain from using drugs. She said that the appellant was not a suitable candidate for correctional supervision.

A psychiatrist, Dr Valjee, testified on behalf of the appellant. He first saw the appellant after the case had been remanded for a probation officer's report and had him admitted to hospital for observation and treatment for five days during this

period. Dr Valjee said that the appellant had an underlying personality problem which caused him to turn to drugs when he was under stress. The appellant had told him that he was addicted to drugs. Since his treatment started he had stopped taking any. Dr Valjee said that the appellant was no longer addicted to drugs but that he needed long-term psychiatric therapy for his underlying personality problems as he could easily when under stress go back to taking drugs. It is clear from Dr Valjee's evidence that the treatment he envisaged was for the appellant's personality disorder and not for drug addiction.

In this Court counsel for the appellant submitted that the Magistrate had failed to give proper consideration to imposing a sentence of correctional supervision in terms of sec 276(1)(i) of the Criminal Procedure Act 51 of 1977. Counsel submitted that the Magistrate erred in accepting, without more, Miss Singh's finding

that the appellant was not a suitable candidate for correctional supervision. He submitted that Miss Singh's finding, in turn, was based merely on what the correctional supervision officer had told her and had been influenced by her mistaken belief that it was due to the appellant's own fault that he had not received rehabilitative treatment following his conviction in 1985. In my view it is clear from Miss Singh's evidence, read as a whole, that it was also her own assessment, based on her own investigation, that correctional supervision was not a suitable sentence for the appellant. She gave a number of reasons for having reached this conclusion, *inter alia* that the appellant was a member of the gang sub-culture, that the four suspended sentences he had received in the past had not curbed his criminal tendencies, that he was neither open nor truthful with her and that he lacked motivation to rehabilitate himself. The Magistrate was thus perfectly entitled to have regard to her

recommendation that he should not impose a sentence of correctional supervision. I am furthermore satisfied that Miss Singh's said finding was not to any material extent influenced by what had happened after the 1985 conviction.

In imposing sentence the Magistrate said that the appellant was not addicted to drugs but that he lacked moral insight and self-discipline and that he exhibited a tendency to lawlessness. The Magistrate took into account the appellant's numerous previous convictions and concluded that previous attempts to deter him or to encourage him to rehabilitate himself outside prison had failed. He considered imposing a sentence of correctional supervision but came to the conclusion that in all the circumstances of the case and having regard to the seriousness of the offence, such a sentence was not the proper sentence. I can find no fault with the approach of the Magistrate.

Counsel for the appellant attacked the Magistrate's finding that the appellant was not addicted to drugs. It was submitted that Dr Valjee's evidence supports the appellant's addiction. I do not agree. The effect of Dr Valjee's evidence was that the appellant was not addicted to drugs and that he needed treatment for his personality problems.

It was finally submitted that the sentence imposed by the Court *a quo* is too severe. In all the circumstances of the case I am unable to find that the sentence is disturbingly inappropriate. For the reasons I have given I can further find no misdirection or other irregularity which would justify this Court interfering with the sentence.

The appeal is dismissed.

W. VIVIER JA.