IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

REPORTABLE

CASE NO. AR265/11

In the matter between:

SELBY NHLANHLA MBATHA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

GYANDA J

[1] In this matter, the accused, Selby Nhlanhla Mbatha, was charged in the Magistrates' Court for the District of Dundee on the main count of dealing in dagga in contravention of the provisions of Section 5(b) read with Sections 1, 13(f), 17(e), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992, in that on or about 14 January 2011 and at or near Dlamini Village in the District of Dundee, he did

wrongfully and unlawfully deal in an undesirable dependence producing substance, to wit Cannabis (Dagga) in the quantity of 3.45 kg; 6.50 grams and 15.5 grams. In the alternative the accused was charged with contravening Section 4(b) read with Sections 1, 13(d), 17(d), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992 for unlawful possession of dagga in that on or about 14 January 2011 and at or near Dlamini Village in the District of Dundee, the accused did wrongfully and unlawfully have use or have in his possession an undesirable dependence-producing substance, to wit Cannabis (Dagga), in the quantity of 3.45 kg; 6.50 grams and 15.5 grams.

[2] The accused, who was unrepresented, pleaded not guilty to the main count but pleaded guilty to possession of the dagga because he smoked it. The State did not accept the plea of the accused on the alternative count and proceeded to trial on the main count. The State called the evidence of Sonesh Singh, a Warrant Officer in the South African Police Services, stationed at the Glencoe Dog Unit, who testified that on 4 January 2011, he proceeded to the home of the accused in the company of one Constable Ndima as a result of information received. They proceeded to the home of the accused armed with a warrant to search the premises.

[3] On searching the premises of the accused, subsequent to obtaining his permission to search the said premises, the police found a parcel of loose dagga in a clear plastic wrapping alongside the bed. On proceeding with their search outside the premises alongside the house, a clear bread plastic packet containing dagga seeds were

found. In addition, they also found a newspaper bundle with a few loose dagga in it. On further searching the yard of the premises next to the house, they found a fully grown dagga tree.

[4] According to the evidence of Warrant Officer Singh, one could see that the tree had been taken care of as it was cleaned and maintained and there were no weeds in the yard. Moreover, the yard was well fenced and there is an access gate allowing access into the premises. The accused was taken with the dagga found, to a pharmacy where the dagga was weighed and thereafter to the offices of the South African Police Services at Dundee where the dagga was handed into evidence into the SAP13 register.

[5] The evidence led by the State in this regard was not challenged at all by the accused in cross-examination in spite of his rights thereto having being adequately explained to him. At the close of the State case and upon his rights to testify or call witnesses being explained to him, the accused elected to remain silent and stated that he wished to leave everything to the Court.

[6] The Trial Magistrate, as he was obliged to do, applied the meaning accorded to the word "cultivate" in the decision of *S v Van Zyl*[1], *R v Potgieter*[2] and *S v Buthelezi*[3] as contained in the definition of "deal in" in Section 1(1) of Act, No. 140 of 1992, and convicted the accused on the main count of dealing in dagga. The definition of "deal

1 1975 (2) SA 489 (N) at 491 at D-F
2 1951 (1) SA 750 (N)
3 1968 (2) SA 715 (N)

in" in the Drugs and Drug Trafficking Act, No. 140 of 1992 reads:-

> "deal in", in relation to a drug, includes performing any act in connection with a transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the Drug."

The accused was sentenced to 18 [eighteen] months imprisonment wholly suspended for a period of 3 [three] years on condition that he is not again convicted of contravening Sections 5(b) or 4(b) of Act, No. 140 of 1992 committed during the period os suspension and in addition he was ordered to pay a fine of R1 000-00 [one thousand rand] or in default thereof to undergo 6 [six] months imprisonment. The dagga was declared forfeited to the State.

The case of the accused was thereafter referred on Automatic Review to Wallis, J (as he then was), who, in a Judgment dated 31 March 2011 opined that the meaning accorded to the word "cultivate" was not the ordinary meaning of the word "cultivate" which in relation to ground is essentially an agrarian term, and relates to an activity associated with agriculture, relying on the decision in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[4], Wallis, J stated that:-

> "If the more conventional meaning is applied, the conviction would fall to be set aside."

4 2007 (5) SA 438 (SCA) p(7)

He accordingly referred the matter for Argument before the Full Court in relation to the meaning of the word "cultivation" in the definition of "deal in" in Section 1 of the Drugs and Drug Trafficking Act, No. 140 of 1992.

[7] Having heard full Argument presented on behalf of the State by Advocate T. S. Jacobs and on behalf of the accused by Adv. J. A. Booyens SC, duly assisted by Adv. S. Franke, both acting *amicus curiae*, to whom we are indebted for their assistance, I came to the conclusion as set out hereunder.

[8] The definition of the term "cultivate" as contained in the forerunner to the existing Act, namely Act, No. 41 of 1971, was dealt with by the Transvaal Provincial Division consisting of, Cillié, JP and Bekker, J in the case of *S v Kgupane en Andere*[5] in the Judgment of Bekker, J, where he stated:-

> "Na my mening geld die volgende: Dat ń kweker van dagga skuldig is aan "handeldryf" is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van "handeldryf" wat werskyn in art. 1 van die Wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak moet word uit hoofde van die omskrywing van "handeldryf" gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem wees. Met ander woorder, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir watter doel dit

5 1975 (2) SA 73 (TPD) p75 H

ook al bestem is. Natuurlik is dit terselfdertyd dan ook so dat die kweker "in besit" van die daggaplant is en dat ń pas ontkiemde plant minder as 115 gram kan weeg. Dit egter, gesien in die lig van die omskrywing van "handeldryf" bied hom geen uitkoms nie. Die klem val nie op die woord "besit" nie maar op "kweek" van dagga, wat hom dan binne die trefwydte van handeldryf insleep."

In this particular case the Court had been dealing with a number of review cases *inter alia* the review case of the *State v Isaak Mashinini* who, like the accused in the present matter under consideration was found in possession of a solitary dagga plant and based on a similar definition of "deal in" in the 1971 Act, he was convicted of dealing in dagga and his conviction and sentence were confirmed. The Provincial Division had to deal with the selfsame query as in the case under consideration, namely whether or not the possession of one dagga plant amounted to dealing in the substance which the Transvaal Provincial Division answered in the affirmative and confirmed the conviction and sentence. It is indeed instructive that the headnote in *S v Kgupane en Andere* reads:-

"Cultivation of dagga is dealing in dagga. It is directly hit by, and falls within the scope of, the statutory definition of "dealing in" which appears in Section 1 of Act 41 of 1971. The inference must be drawn from the definition of "dealing in", seen in the light of the prescribed sentence, is that the intention of the Legislature to put an end to the cultivation of dagga even though it was intended by the cultivator for his own use. *(my underlining).* The prescribed sentence must then be imposed. The escape which

> Section 10 (1)(b) offers the accused is, for example, the possibility of persuading the Court that he was not in fact the cultivator of dagga."

[9] In this regard, counsel for the State also referred us to the decision in *State v Guess*[6], a decision of the Appellate Division (as it then was) , a decision of Joubert, AJA, in which Holmes, JA and Trollip, JA concurred, where the Appeal Court had to deal with the definition of the word "cultivate" or "cultivation" as they appeared in the preceding Act, namely Act, No. 41 of 1971 as amended. In his Judgment at page 717, Joubert, AJA stated:-

> In cases dealing with "cultivation" of dagga plants, our Courts have accepted the word, "cultivate" as ordinarily meaning "to promote or stimulate or foster the growth of a plant by any person".

The learned Judge of appeal thereafter referred to various decisions in which this definition was accepted and applied.

[10] In the matter of *State v Guess,* however, the Court questioned whether the State succeeded in establishing beyond a reasonable doubt, the factual premises so as to give rise to the presumption contained in Section 10(1)(b) that the appellant dealt in 85 dagga plants in contravention of Section 2(a) of the Act and, if so, whether the appellant succeeded in rebutting the presumption by proving on the balance of

6 1976 (4) SA 716 AD

probabilities that he did not cultivate the dagga plants. The Court concluded that the State proved beyond a reasonable doubt that the appellant was in possession of the dagga plants and therefore the Court *a quo* ought to have properly convicted him of the alternative charge under Section 2(b) of having being in possession of 85 dagga plants and not of dealing therein.

[11] In the light of the aforegoing it must be presumed, therefore, on the so called "Barras" Principle, that the legislature, when they enacted current Drugs and Drug Trafficking Act, No. 140 of 1992 must have been aware of the definition accorded to the word "cultivate" in the decisions referred to above, more especially the decision of the Appellate Division in *S v Guess* and, therefore, they must have accepted that that definition would apply to the word "cultivation" as it appears in Section 1(1) of the present Act or they would have stated otherwise. The "Barras" Principle, as it has become to be known, is the decision in the House of Lords and the Privy Council in the case of *Barras v The Aberdeen Steam Trawling and Fishing Company, Limited*, as reported in the 1933 English Law Reports, Appeal Cases at pages 402 where the Court dealing with the definition of the word "wreck" stated that:-

> "… on the ground of the word "wreck" having being used in the Act of 1894 and having received a judicial interpretation must, when used in the same context in the Act of 1925, bear that interpretation unless a contrary meaning is indicated …"

The principle of interpretation in the *Barras* decision, (although it was not specifically

referred to), was followed by the Appellate Division (as it then was) in the matter of *The Minister van Justisie v Alexander*[7] in the Judgment of *Corbett JA* where he stated:-

> "It is one of the canons of statutory interpretation that the Legislature is presumed to know the existing state of the law: and from this presumption arises the rule that a statute must be interpreted in the light of the existing law (see *Steyn*, op. cit., pp. 105, 139, xliv; Craies on Statute Law, 7th ed., pp. 96 – 8."

[12] I am of the view therefore, that in spite of the sympathy that may be felt for a user of dagga planting a single dagga plant for his own use to be convicted of dealing in dagga rather than possession thereof, as stated by Bekker, J, in *S v Kgupane en Andere* it is quite clear that the intention of the Legislature was that in its pursuit of the sharks that unfortunately some minnows may be caught in the same net.

[13] It is instructive, in this regard, that the State of Maine in the United States in it's statutory definition of "cultivation" defines it as:-

> "to grow a seed; to grow, raise or tend to a plant; to harvest a plant; or to knowingly possess a plant." (No. 10 – 1281. – *McGuire v Holder* – US First Circuit as quoted in Findlaw for English Professionals."

In view of the foregoing and in spite of the definition accorded to "cultivate" by

7 1975 (4) SA 530 (A) p 550

Combrink, JA in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[8] where he stated:-

> " 'Cultivate' in relation to ground is essentially an agrarian term and relates to an activity associated with agriculture. There is no reason why the primary meaning should not be applied considering that the Act makes serious inroads on the rights of owners."

That definition in my view, is not applicable to the present case as it clearly applied in a different context to the present case wherein the word "cultivate" has, as already been seen been dealt with and defined by our Courts directly on point in relation to its applicability to the Drugs and Drug Trafficking Act more especially dealing therein.

[14] It has been argued that a proper interpretation to be attached to the word "cultivate" would be the Oxford dictionary one, meaning:-

> "raise or grow (plants) especially on a large scale for commercial purpose"

on the basis that such a definition would do justice to the case of a dagga user who grew a solitary plant to satisfy his own needs and cannot really be deemed a dealer. This in my view, is merely based on the sympathy felt for a user who is not in actual fact a dealer. To put into perspective this attitude one would have to, in due course, extend this "extended definition" to the situation of a manufacturer of mandrax or

8 2007 (5) SA 438 (SCA) p 7

cocaine who has a laboratory at home and manufactures small amounts for his own consumption. This could definitely never have been the intention of the Legislature. It is abundantly clear that the intention of the legislature was to stop the production and supply of drugs when it enacted Act No. 140 of 1992 and defined "deal in" as it did in Section (1) of the Act.

The circumstances in relation to drug users found in the position of the accused herein are factors that may be relevant only to the question of the sentences to be imposed.

[15] I am of the view, in all the circumstances, that this Court cannot come to the assistance of a user of dagga who cultivates a dagga plant for his own personal use, in the light of the definition of "dealing in" to say that in as much as he did not cultivate it for the purposes of dealing in the substance but for his own use and possession, he should therefore not be convicted of dealing in dagga.

[16] In my view, would be wrong as his act of cultivation falls full square within the definition of the phrase "dealing in" in the Act and he has, in my view, correctly been convicted of dealing in dagga.

I would accordingly confirm the conviction and sentence imposed.

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GYANDA J

_____ I agree.
NTSHANGASE J

APPEARANCES

DATE OF HEARING:	18 November 2011
DATE OF JUDGMENT:	23 February 2012
COUNSEL FOR APPELLANTS:	Mr J. A. Booyens SC (with Ms S. Franke)
COUNSEL FOR RESPONDENT:	Mr S. Gazo