40/75

O.F.S. A. 448.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
(AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

THARAJ PILLAY

Appellant.

versus/teen

DIE STAAT

Respondent.

J.Roux & Co. Durban

Appellant's Attorney / ***Prokureur van Appellant*** — ***Respondent's Attorney*** / ***Prokureur van Respondent*** G.(Pmbg.)

Appellant's Advocate / ***Advokaat van Appellant*** W.P.Boshoff — ***Respondent's Advocate*** / ***Advokaat van Respondent*** T.B.van Rensburg

- 8 - 1976

Set down for hearing on / ***Op die rol geplaas vir verhoor op***

(N.P.D.)

Coram: Jansen (Mullins J.A. et Miller A.J.A.
9.45 am — 10.30 am.
Mnr. van Rensburg not called upon
C.A.V.

The Court dismisses the application for condonation

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

THARAY PILLAY .....APPELLANT

and

THE STATE .....RESPONDENT

Coram: JANSEN, MULLER, JJ.A., et MILLER, A.J.A.

Heard: 14 May 1976.

Delivered: 2 June 1976.

J U D G M E N T

MULLER, J.A.

The appellant, an Asian male, was charged together with an Indian youth, Subril Govender, in the Magistrate's Court, Pinetown, with a contravention of section 2 (b) of Act No. 41 of 1971 - being in possession

of...../2

of dagga.

Both accused were found guilty. The appellant was sentenced to imprisonment for 2 years and his co-accused, Govender, was ordered to receive a whipping.

The appellant noted and prosecuted an appeal to the Natal Provincial Division. That appeal was dismissed, hence the further appeal, to this Court, with the leave of the Court a quo, against both his conviction and sentence. There is also an application for condonation of the appellant's delay in prosecuting the appeal.

At the hearing of the matter this Court directed that the merits be argued, as the merits could well be decisive of the application, and reserved its decision.

The evidence adduced on behalf of the State at the trial is, in my view, correctly and succintly summarized, in the following extract from the judgment of JAMES, J.P., in the Natal Provincial Division, (in which judgment the youth, Govender, is referred to as accused No.2):

"The ...../3

"The evidence for the State was given in the main by one Sergeant Ramchunder, who testified that at about 6.45 on the morning of the 21st August, 1974 he went to the Unit 7 bus rank at Chatsworth. He was in uniform and he knew the appellant. The appellant came to the bus rank at about 8 a.m. He watched the appellant approach a stationary bus, and in the vicinity of the bus Ramchunder saw the appellant picking up a flattened tin which was lying on the ground, and he saw him placing something having a brown paper appearance under the tin. The appellant then stood about 4 paces from the tin, on the pavement, next to a stationary bus. About ten minutes later he saw a Bantu come and speak to the appellant. He was then observing what was happening from a distance of about 40 yards. Ramchunder then saw the appellant pointing out the tin. The Bantu then went to the tin, lifted it up and removed something from underneath it, and then got into a bus which was in the process of moving off. About five minutes after this he observed an Asian male come and speak to the appellant. The Asian male then went to the tin and he put his hand under the tin and then he moved off. Thereafter the appellant went to sit in the bus which was still stationary and, on the evidence, this bus was about 4 paces away from the tin. At about 8.50 that morning a green truck came to the scene and stopped next to the stationary bus. By this time accused No. 2 had

arrived...../4

> arrived and he had been sitting for some time in the stationary bus with the appellant. When the green truck arrived this witness said he saw the second accused alight and go to the tin and take something from under it. Accused No. 2 then handed this thing to the driver of the green truck, who drove away. Thereupon Ramchunder came on to the scene. He grabbed hold of the appellant. The second accused was then outside the bus, about 4 paces from the tin, and he also caught hold of him. He took both the appellant and the second accused to the tin and he invited the appellant to lift the tin. The appellant then said that it was not his and refused to lift it. Accused No. 2 also said that it was not his. Ramchunder himself then picked up the tin, and underneath he found 17 dagga cigarettes, all covered in brown paper. He estimated that the mass of these dagga cigarettes was about 17 grams. He then arrested the appellant and the second accused. The dagga cigarettes were each about 5 inches long and about ¼ inch thick and were cylindrical in shape."

No evidence was given by or on behalf of the accused, both of whom were represented at the trial, and, as already stated, they were both convicted and the appellant sentenced to imprisonment for a period of two years.

In his reasons for judgment the Magistrate stated as

follows...../5

follows, with regard to the appellant:

"In considering an appropriate sentence the court considered the following :-

(1) Appellant was 22 years of age.

(2) Was in employment.

(3) Convicted of four offences ranging from smoking dagga to theft, assault with intent to commit grevious bodily harm and housebreaking with intent to steal and theft. These convictions cover the past seven years.

(4) Appellant has not learnt by the previous light sentences imposed.

(5) Appellant's conduct had the tendency to deprave others. Sight should not be lost of the fact that Accused No. 2 was only 16 years of age.

(6) Appellant's conduct was tantamount to Dealing. Dagga was hidden and supplied at a public place - a bus rank - an aggravating factor.

(7) Dagga offences are rife amongst Indian community at Chatsworth who treat the abuse of this drug with the attitude that a child would display towards a bar of candy.

(8) It was considered proper that the deterrant aspect of punishment be stressed in this case.

No circumstances were found to justify a sentence of less than 2 years imprisonment, in terms of section 7 Act 41/71. "

On...../6

In arguing on the merits counsel for the appellant contended that, even though the appellant did not give evidence at the trial, he should not have been convicted. In this regard the following submissions were made by counsel:

(a) That the inference drawn by the Magistrate from the proved facts is not the only reasonable inference that can be drawn. (R.v.Blom 1939 A.D. 188 at p. 202 and 203).

(b) That the State failed to prove mens rea on the part of the appellant.

(c) That the State case was based on circumstantial evidence only, and, ~~inasmuch as~~, so counsel submitted, the reason for the appellant's failure to testify may be explicable upon some hypothesis unrelated to his guilt. (S.v.Letsoko and Others 1964 (4) S.A. 768 (A) at p. 776 to 777 and S.v. Mthetwa 1972 (3) S.A. 766 at p. 769). Counsel

suggested...../7

suggested certain possible reasons unrelated to the guilt of the appellant.

As, in my view, no good purpose will be served in repeating counsel's detailed argument here, I will confine myself to stating my reasons for disagreeing with the aforementioned submissions.

As to (a) above: although there certainly are other possible inferences which can be drawn, in my opinion the only reasonable inference is that drawn by the magistrate, namely, that the appellant placed the dagga under the tin and had possession and exercised control over the dagga.

As to (b) : assuming (without deciding) that it was for the State to prove mens rea (as to which see S.v. Mofokeng 1973 (2) S.A. 89 (o) and S.v.Majola 1975 (2) S.A. 727 (A) at p. 736), it is my view that the proved facts clearly and sufficiently establish that the appellant had the necessary intention to possess.

As...../8

As to (c): Although counsel suggested certain possible reasons, unrelated to guilt on the part of the appellant, for his failure to testify, it seems to me that the most probable explanation for his failure so to do is that he knew that he was guilty.

For the reasons aforestated it is my view that a prima facie case, calling for an answer, was established, and that the appellant's failure to testify was a factor that was properly taken into account by the Magistrate in deciding whether he was in fact guilty. I can therefore see no prospects of success on the merits in so far as the conviction is concerned.

I came now to the sentence. Counsel for the appellant contended that the Magistrate, in determining what sentence to impose, misdirected himself in certain material respects, and he contended further that the sentence imposed is, regard being had to all the circumstances of the case, so severe that it induces a sense of shock.

With ...../9

With regard to the firstmentioned aspect, counsel argued that the Magistrate erroneously considered that the appellant was dealing in dagga and took that consideration into account, and, secondly, that the Magistrate found, without sufficient reason, that the appellant had influenced his co-accused, the youth Govender.

I cannot agree with counsel's submission that the Magistrate ~~had~~ misdirected himself in any of the respects alleged. In this regard I hold the same view as that expressed by JAMES, J.P., in the following passage in the judgment of the Court a quo:

> "The Magistrate also said that the appellant's conduct had had a tendency to deprave others and that sight should not be lost of the fact that the second accused was only 16 years of age. This finding of the magistrate was heavily criticised by Mr. Penzhorn, but it seems to me clear that if it was the appellant who in fact placed the dagga underneath the tin then it was only because of his imparting this knowledge to accused No. 2 that induced accused No. 2 to go to the tin and get a supply of dagga for the man in the green truck. It seems to me therefore that the magistrate

was...../10

was justified in saying that the appellant's conduct had had the tendency to deprave the second accused.

The magistrate said further that the appellant's conduct was tantamount to dealing. The dagga was hidden and supplied in a public place and he regarded this as an aggravating factor. I can find no fault with the magistrate's reasoning on this matter. It seems to me that the definition of 'dealing' in section 1 of the Act might well be wide enough to cover the conduct of the appellant because 'deal in' is defined as including performing any act in connection with, amongst other things, the supply of dagga, and there does seem to be some ground for suggesting that in this case the appellant's conduct must have been very close to supplying dagga from underneath the tin even though there was no evidence that money passed in the transaction."

With regard to the second aspect, the alleged severity of the sentence, counsel submitted that the Magistrate should have found that there were circumstances justifying the imposition of a sentence of imprisonment of less than two years. (Section 7 of Act 41 of 1971). In this regard counsel stressed the following factors:

(i) That the appellant was a young man, 22 years of age.

(ii)...../11

(ii) That he was in regular employment.

(iii) That the quantity of dagga (17 grams) was relatively small.

In the alternative, it was submitted that, even if the Magistrate was correct in finding that there were no circumstances such as envisaged by section 7, he should still have considered suspending a portion of the prescribed minimum sentence of 2 years.

On a proper consideration of the matter, I cannot see that there is any ground for interfering with the Magistrate's exercise of the discretion conferred on him by section 7 of the Act or with the exercise by him of the discretion as to whether or not to suspend any part of the prescribed minimum sentence. Nor do I find, regard being had to all the circumstances of the case and the particular circumstances of the appellant, that the sentence induces a sense of shock or, as the test is sometimes stated to be, that there is a striking disparity between the

sentence...../12

sentence imposed and that which this Court, sitting as a court of first instance, would have imposed. (S. v. Anderson 1964 (3) S.A. 494 at p. 495). There is accordingly, in my view, no prospect of success in so far as the appeal against the sentence is concerned.

For the reasons aforestated the application for condonation cannot succeed, with the result that the appeal falls away.

The application for condonation is refused.

G. v.R. MULLER, J.A.

JANSEN, J.A.)
) CONCUR
MILLER, A.J.A.)