Case no 559/92
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ROBERT WILLIAMS ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : KUMLEBEN, EKSTEEN et NIENABER JJA

HEARD : 23 SEPTEMBER 1993

DELIVERED 29 SEPTEMBER 1993

JUDGMENT

KUMLEBEN JA/...

The appellant, on his plea of guilty, was convicted in the magistrate's court of illicit possession of 17 "pills" (weight undisclosed) of dagga in contravention of s 2(b) of Act 41 of 1971. In the light of his previous convictions for this offence, and a more serious one for dealing in dagga, he was sentenced to five years imprisonment. His appeal to the Cape Provincial Division against sentence failed but he was granted leave to prosecute this further appeal.

In dismissing the appeal the court a quo (Tebbutt and Scott JJ) referred to an earlier decision of that Division, also on appeal, relating to the sentencing of dagga offenders: S v Johnson 1980(3) SA 188(C) . In that case the accused had received a sentence of 4 years imprisonment for being in unlawful possession of an insignificant amount (0,875 gr) of dagga. The offence was committed

whilst the accused was in prison serving a sentence of 5 years for dealing in dagga. He had a host of previous convictions for unlawful possession of and dealing in dagga and for certain other common law crimes. For the seven contraventions of Act 41 of 1971 and its predecessor, Act 13 of 1928, he was sentenced in aggregate to 15 years, of which in respect of one conviction 2 1/2 years were suspended. On appeal the sentence was reduced to one of 2 years imprisonment. In the course of the judgment the court commented adversely on the wide discrepancy in the sentences imposed in the lower courts for dagga offences. It gave illustrations of what it referred to as radical differences evidenced by cases submitted for automatic review. These led the court to observe that:

> "Alhoewel strakke eenvormigheid met betrekking tot vonnisse in hierdie soort gevalle af te keur is, is dit egter ook onwenslik dat vonnisse.

> selfs met inagneming van besonderse plaaslike omstandighede of faktore, in andersins aanverwante sake so radikaal verskillend moet wees.
>
> Na bespreking van hierdie ongewenste toedrag van sake was die Regters van hierdie Afdeling dit eens dat vonnisse van meer as twee jaar effektiewe gevangenisstraf selfs waar die oortreding in die gevangenis gepleeg is en waar die beskuldigde vorige veroordelings vir besit van of handeldryf in dagga net, slegs in baie uitsonderlike gevalle opgele behoort te word." (195C-D).

The judgment of the court a quo referring to the above said:

> "Hierdie sogenaamde beleid kan egter nie as die wet van die Mede en die Perse beskou word nie. Dit beteken seer sekerlik nie dat in alle gevalle waar 'n daggabesitter twee of meer vorige veroordelings vir dergelike oortredings op sy kerfstok net, nie meer as twee jaar gevangenisstraf sal opgele word nie. As gereelde daggagebruikers onder daardie indruk deur die uitspraak in JOHNSON se saak gebring is, sal dit myns insiens heeltemal verkeerd wees."

And in granting leave to appeal the court reverted to Johnson's case, remarking that:

> "Hierdie hof het tot die gevolgtrekking gekom dat dit nie in alle gevalle so is dat maar net twee jaar gevangenisstraf opgele kan word nie, en dat in gepaste gevalle meer as twee jaar gevangenisstraf opgele mag word. Dit sal derhalwe waardeer word dat hier twee uiteenlopende uitsprake in die verband is."

If one is to conclude from what was said by the court a quo that we are impliedly asked to resolve what is seen to be a conflict between two courts of equal status, no need to do so in fact arises. Sentencing is pre-eminently a question of discretion having regard to the triad of considerations which are too well-known to require repetition. They are to be applied to the facts of each particular case in deciding whether imprisonment is the only appropriate sentence and, if so, what the period ought to be. The stipulation of an arbitrary period of imprisonment as a maximum with the inherently imprecise qualification of "exceptional

circumstances" cannot in my view facilitate this task. Thus, even if one accepts that in 1980 when the Johnson appeal was heard the prevailing local situation warranted such an observation or guideline, this court ought not now to endorse it.

However, leave to appeal was also granted on the additional, and independent, ground that there was a reasonable prospect of this court altering or reducing the sentence. Thus the critical question for determination is whether the trial court exercised a proper discretion in sentencing the appellant to serve 5 years imprisonment.

The appellant's chronicle of previous convictions makes lamentable reading. Over a period of some thirty years as from about nineteen years of age (if his age reflected in the charge sheet can be relied upon) he had been convicted six times for being in possession of, and once for dealing in,

dagga before this most recent offence was committed. The sentences imposed, after a small fine for his first contravention, were 2 years imprisonment in 1963 for possession for the purposes of sale; 18 months imprisonment in 1976 for possession; and 36 months in 1978 for dealing, half of which period was suspended. In 1986 for being in possession of 40 gr a sentence of 5 years imprisonment was imposed. The sentence was set aside on review and, after remittal to the trial court, the appellant was referred to a rehabilitation centre. Despite the treatment he must have received there, during 1988 he was again convicted for possession of 4 gr for which he was sent to prison for one year. He was unconditionally released in March 1989 and in January 1990, some 10 months later, he was convicted of the present offence.

Up until the time of conviction the

appellant was represented by an attorney. He handed in on behalf of the appellant a written statement in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 in which the appellant said that he had possessed the dagga for his own use. After his conviction the appellant, now unrepresented, elected not to adduce evidence in mitigation of sentence. What did take place is thus recorded:

> "Beskdeel hof mee dat hy nie van voornemens is om dienste van ander prokureur te verkry nie.
>
> Erken vorige veroordelings - SAP 69.
>
> Ter versagting: Regte verduidelik: Verkies nie te getuig of getuies te roep nie.
>
> Besk. se: Ek vra 'n boete.
>
> Hof: Getroud - het 2 skoolgaande kinders. Verdien R600,00 per maand. Vrou werk nie.
>
> V. Het u problems met dagga?
> A. Nee - Ek is nie verslaaf aan dagga nie.
> V. Hoe lank was u in rehabilitasiesentrum.
> A. Ek was net 6 maande daar - toe ontslaan hulle my en se ek het nie daggaprobleme nie.

> SA wys op vorige veroordelings. Vra direkte gevangenisstraf."

This was a somewhat exiguous enquiry particularly if a long period of imprisonment was contemplated as an appropriate sentence. Since questions were put to the appellant, and he was prepared to answer them from the dock, it might have been of value to know the source of his monthly income, whether he was in regular employment and, if so, for how long. More pertinently his bald allegation that he is not an addict and his statement that when discharged from the rehabilitation centre this was told to him ought not to have been taken at face value. The magistrate said in his reasons for sentence that he did consider the desirability of sending the appellant to such a centre. In that case all the more need for a proper enquiry in this regard.

The main purposes of punishment, as is well

known, are reformation, retribution and deterrence. To what extent in this case is a . long period of imprisonment likely to serve or attain these objectives? The information on record does not satisfactorily establish whether his problem is addiction or deliberate misconduct. If the former, - as Johnson's case illustrates - imprisonment will not necessarily deprive him of the source of his dependancy and any treatment received there has not - at least in the long run - proved successful. If the latter, the record convincingly demonstrates that this form of punishment has had no reformative effect. As regards retribution, it is, broadly stated, the expiation required of an offender for the mollification of the injured party and society at large: "Retribution means, in essence, the act of requiting or paying in return for evil done": Commission of Inquiry into The Penal System of the

Republic of South Africa 1976 para 5.1.2.8 page 52. (And see Du Toit Straf in Suid-Afrika 102.)

Particularly since no complainant or injured party was involved in this offence, the need for retribution cannot feature significantly in this case. Heavy sentences in the past have, as I have said, not prevented the appellant from repeating this offence. Any virtue in a prison sentence for its deterrent effect must therefore refer to its intended restraining influence on other would-be offenders. That this was the main reason for the confirmation of the sentence by the court a quo appears from the passage already cited from the judgment. In stressing this reason for upholding the sentence emphasis was placed on what was said by Steyn J in S v De Vos 1970(2) SA 590(C) 593 A - E:

> "Daar was ongetwyfeld in die afgelope jare 'n geweldige toename in oortredings van hierdie Wet insoverre as wat dit sy verbodsbepalings

> aangaande die besit, verkoop, lewering en vervoer van dagga betref. Daar bestaan by hierdie Hof geen twyfel uit hoofde van sy ondervinding, uit hoofde van getuienis wat in verskeie sake voor hom afgele is, dat die gebruik van dagga nadelig inwerk op diegene, lede van die gemeenskap, wat gebruik maak daarvan nie. Dit geld - en ek wil dit onmiddellik stel - nie alleenlik vanwee die feit dat die gebruik van dagga kan lei tot die gebruik van meer ernstige en selfs meer skadelike verdowingsmiddels nie, dit geld vir die gebruik van dagga per se. Daarbenewens is ons daarvan oortuig dat dit ' n rol speel of op sigself of tesame met die gebruik van drank, wat die pleeg van ander oortredings en veral misdade en geweld aanbetref. Derdens is dit ons mening dat dit die vermoe van diegene wat dit gebruik om te presteer op aansienlike wyse nadelig beinvloed. Ons deel hoegenaamd nie die soetsappige sentimentele uitgangspunt dat die gebruik van dagga iets is wat deur die gemeenskap as 'n moderne manifestasie van ons maatskaplike samelewing aanvaar_moet word nie. Dit is ons mening dat dit die plig van ons howe is, ter beskerming van die gemeenskap, om vonnisse op te le wat 'n rol kan speel by die bekamping van die oortreding, en hier qaan dit meer besonderlik oor die afskrikwaarde van vonnisse van gevanqenisstraf." (Emphasis supplied.)

But as regards the appellant the possession and use

of dagga on his part, one infers, has not caused him to become addicted to more harmful drugs. Nor has it led to the commission of any crimes of violence: his only other offences are for escaping or attempting to escape from custody and two minor contraventions of the Liquor Act, 30 of 1928. Furthermore, there is no evidence that his ability to hold down a job or support a family has been detrimentally affected: the little that is on record points the other way. All this is not to say that his most recent offence is not to be regarded in a serious light. But the critical question remains: whether a long term of imprisonment to serve as a deterrent to others is justified in this case at the expense of being fair to the appellant - particularly if the imposition of some more constructive form of punishment can be entertained. As Miller J in S v Khulu 1975(2) SA 518(N) 521 E pointed out:

> "[A]n 'exemplary' sentence may be justified only where the injustice thereby done to the individual is 'moderate'; a degree of injustice in that sense may be a lesser evil than the neglect of the broad interests of society which sometimes require that severe sentences, possibly in excess of the true deserts of the offender in the particular circumstances of his case, should be imposed for deterrent effect. But I cannot conceive of any principle which could justify, for the sake of deterrence, the imposition of a sentence grossly in excess of what, in the circumstances of a particular case and having regard only to the crime and the degree of the particular offender's moral reprehensibility, would be a just and fair punishment."

In my view the sentence of 5 years imprisonment, taking into account all the relevant circumstances, does result in more than a "moderate degree of injustice" to the appellant and is to my mind disturbingly inappropriate. This court is thus free to consider sentence afresh.

In the course of argument before us the feasibility of imposing a sentence of correctional

5 supervision in terms of s 276(1)(h) of the Criminal Procedure Act was raised. Its merits in reference to this case are the following:

(1) The consideration of such an order would involve the setting aside of the existing sentence and the remittal of the case to the trial magistrate for his decision on the suitability of this form of punishment. This in turn would entail a proper and detailed enquiry to determine whether he is addicted and, if so, the manner in which he could be treated at a rehabilitation centre not within prison precincts. There would in addition be an opportunity to obtain more information relating to his form of employment and other relevant personal details.

(ii) Any such rehabilitative treatment which

might be necessary would have - one may confidently suppose - a better prospect of success whilst the appellant is a member of the open community, employed and living with his family.

(iii) The prospect of his having to serve a term of imprisonment should he fail to comply with any of the conditions of such an order would be ever present to serve as a deterrent.

(iv) Such an order could, and perhaps should, have a community service component that would satisfy any need for the retributive element of punishment to be acknowledged.

(v) Though differing from a conventional prison sentence, correctional supervision, depending on

> the conditions imposed, can amount to an appropriately severe sentence thus serving as a deterrent to others and indeed perhaps giving more publicity to the fact that these offenders do not go unpunished.

All in all, this alternative punishment would appear to hold out a better prospect of a constructive result than yet another prison sentence. Corrective supervision was introduced as a sentence option by s 41(a) of Act 122 of 1991 and was therefore not one available during 1990 when the trial and appeal took place. This, however, is no bar to this court remitting the matter for such a sentence to be considered. (S v R 1993(1) SA 476 (A) 484 J - 485G.)

In the result the appeal succeeds. The appellant's sentence is set aside and the matter is

remitted to the trial court to sentence the appellant, after due compliance with the provisions of s 276A(l)(a) of the Criminal Procedure Act 51 of 1977 to correctional supervision in terms of s 276(1) (h) of that Act or, if for good reason the appellant is found not to be fit for such a sentence, to otherwise sentence him in the light of the views expressed in this judgment.

M E KUMLEBEN
JUDGE OF APPEAL

EKSTEEN JA
NIENABER JA - CONCUR