Case No 423/95
/MC

IN THIS SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

HLONGWANA PHAKO APPELLANT

and

THE STATE RESPONDENT

CORAM: VIVIER, HARMS JJA et ZULMAN AJA.

HEARD: 7 MARCH 1996.

DELIVERED: 7 MARCH 1996.

TRANSCRIPT OF REASONS ORALLY DELIVERED IN OPEN COURT ON THURSDAY 7 MARCH 1996, BY VIVIER JA AND CONCURRED IN BY HARMS JA AND ZULMAN AJA.

VIVIER JA:

The appellant was convicted in the Komga Magistrate's Court on a charge of dealing in 292 kilograms of dagga in contravention of sec 5 (b) of Act 140 of 1992. He was sentenced to eight years' imprisonment of which three years were suspended for five years on certain conditions. His appeal against the sentence to the Eastern Cape Division was unsuccessful and with the necessary leave he appeals to this Court against the sentence imposed upon him.

The appellant pleaded guilty at the trial and in his statement handed in in terms of sec 112 of Act 51 of 1977 he admitted that he had been found in possession of the said quantity of dagga and that he had accordingly dealt in it. No evidence was led at the trial and nothing further is known about the circumstances in which the crime was committed, except that the appellant was on his way to Cape Town with the dagga when he was apprehended.

The appellant's personal circumstances are that he is 25 years old and married with two minor children. He is in fixed employment and is a first offender. All these factors, as well as the fact that the appellant had shown remorse, were taken into account by the magistrate in mitigation of sentence. On the other hand the magistrate had regard to the gravity of the offence and, in particular, the prevalence of the offence in the Komga district. He said that the incidence of the crime in the Komga district had more than doubled in 1994 when the crime was committed, compared with the figures for 1993. The magistrate also said that the dagga involved was sufficient to prepare 292 000 socalled zols with a street value of R292 000-00.

On appeal it was submitted on behalf of the appellant that the magistrate misdirected himself by taking into account the prevalence of the offence in his district as well as the street value of the dagga

in the absence of any evidence to that effect having been placed before him. In my view the magistrate was perfectly justified to have regard to the prevalence of the offence in his district as it can safely be accepted that he had personal knowledge of this fact. (S v M 1990 (2) SACR 509 (E) at 512 f-g; S v Nkosi 1992 (1) SACR 607 (T) at 609 f-g.) The Court a guo remarked in this regard that all the judges in its division know from their reading of review cases from Komga about the increase in this type of offence in the district. The figures relating to the street value of the dagga mentioned by the magistrate mean no more than that dagga of a substantial value was involved. And that is self-evident considering the large quantity of the dagga.

It was further submitted that the magistrate over-emphasised the interests of society at the expense of those of the appellant. I do not agree. That there is a need to protect society against the

ever increasing trade in dagga is clear, and I can find no indication in the present case that this was done without due consideration to the appellant's personal circumstances.

It was further submitted that the appellant merely conveyed the dagga for someone else and that he did not himself deal in it. There is no evidence to justify a finding that this reduced his moral blameworthiness in any way.

Counsel for the appellant referred us to a number of reported decisions on sentences imposed in similar cases. He submitted that these cases show that the sentence imposed in the present case was so severe as to induce a sense of shock. There is little point in embarking upon a comparative analysis of similar cases as each case must depend upon its own facts and circumstances. It is sufficient to say that I do not regard the sentence imposed in the present case as excessive.

It was submitted that the magistrate misdirected himself by ignoring the change in legislative policy regarding sentences brought about by Act 140 of 1992. There is no merit in this submission. The magistrate quoted the correct penal provisions of the present Act and the mere fact that he referred to cases decided under the previous Act clearly does not mean that he overlooked the provisions of the present Act.

It was submitted that the magistrate misdirected himself by not considering a sentence of correctional supervision. There is no indication that the magistrate did not do so. As the Court a guo has pointed out, this was not raised as a ground of appeal in the appeal to that Court, so that the magistrate was not given an opportunity to state whether he had considered a sentence of correctional supervision. Under the circumstances I am not prepared to hold that the magistrate has failed to consider a sentence

of correctional supervision. In my view such a sentence would not be appropriate in the present case.

In the result it cannot be said that the magistrate misdirected himself or that the sentence imposed is so severe that interference with it would be justified.

The appeal is dismissed.

W. VIVIER JA.