THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Case no: 18364/2002

1.2 REPORTABLE

In the matter between:

Jabulane Billyboyi SITHOLE Appellant

~~**DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL**~~
~~Second Appellant~~

~~**MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT**~~
~~Third Appellant~~

and

The STATE~~**Thomas Frederick van ROOYEN**~~
~~R~~Respondent

Before: ~~Howie P, Scott~~Cameron, Conradie ~~Cloete~~and van Heerden J~~Ponnan~~ JA
Appeal: ~~5~~Monday 30 August 2004
Judgment: Thursday 16 September 2004

Criminal law – Evidence – When inference may be drawn from accused's untruthful assertion that he waived right to pre-trial silence
'Value'~~Magistrate Security~~ in minimum sentence legislation – Dagga in bulk – Erroneous to equate it with value of dagga sold in one-gram parcels – Quality and seasonal considerations also relevant
Sentence – Appropriate sentence for dealing in 160kg of dagga

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JUDGMENT

CAMERON JA:

[1] The regional court at Villiers, Free State, convicted the appellant of dealing in 160 kilograms of dagga.[1] The regional magistrate, Mr Aucamp, found that the value of the dagga in question was R160 000. Since this exceeded the R50 000 figure specified in the 1997 minimum sentence legislation,[2] the minimum sentence of fifteen

[1] Section 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 provides (subject to exceptions not relevant to the present case) that no person shall 'deal in' – '(*a*) any dependence-producing substance; or (*b*) any dangerous dependence-producing substance or any undesirable dependence-producing substance'. Section 1 provides that '"deal in", in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug'. Part III of Schedule 2 to the Act classifies 'Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol]' as an 'undesirable dependence-producing substance'. Section 13(*f*) of the Act provides that any person who contravenes s 5(*b*) shall be guilty of an offence.
[2]Section s 51(2)(*a*)(i), read with s 51(3)(*a*), of the Criminal Law Amendment Act 105 of 1997 specifies that in the absence of 'substantial and compelling circumstances' that justify a lesser sentence, a first offender convicted of 'an offence referred to in Part II of Schedule 2' is liable to a minimum sentence of 15 years. Part II of Schedule 2 includes any offence referred to in s 13(f) of Act 140 of 1992 –
'if it is proved that –
(*a*) the value of the dependence-producing substance in question is more than R50 000,00;
(*b*) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
(*c*) the offence was committed by any law enforcement officer.'

years became applicable. The magistrate found however that 'substantial and compelling circumstances' were present. These justified a lesser sentence, and he imposed a seven-year term. The appellant appealed to the high court in Bloemfontein against his conviction and sentence. His appeal was unavailing. This is a further appeal against both conviction and sentence, with leave granted by the high court (Hattingh J, Ebrahim J concurring).

Conviction of dagga dealing

[2] The appellant was arrested on the N3 highway to Gauteng on Monday morning 15 November 1999 at a police road block near the tollgate between Warden and Villiers. He was driving a small three-door Opel Corsa sedan with tinted windows. He was alone. When he opened the window at the request of inspector Masondo of the South African Police Services, a strong smell of dagga emanated from the vehicle, which was then searched. Eight cloth bags (streepsakke) plus two zipped carry-bags filled with dagga were found. They were stacked into the rear of the car and on the back seats and covered with a blanket.

[3] The appellant did not dispute the material elements of this evidence. His case – set out in his plea explanation at the start of the trial and repeated in his evidence – was that he did not realise that the load in

his vehicle was dagga. On the day before his arrest he discovered that his sister's son had taken his car without permission from his home in Tsakane, near Brakpan, Gauteng. Later that afternoon, the nephew called to say that the car had broken down alongside the N3 from KwaZulu-Natal. He instructed the nephew to wait beside the car. The next morning, Monday, he set out along the N3 highway by minibus taxi, reaching the scene at about 06h00. He was very angry. The nephew when confronted ran off. Because he had to return to work that day, the appellant replaced the spark plugs (arriving prepared for this task) and summoned the nephew to return with him. But the latter, fearing the appellant's temper, demurred. The appellant then drove off. What of the powerful odour that hit Masondo when the window was lowered? The appellant said that he did not know dagga – indeed, he picked up no strange smell at all. He saw goods covered with a blanket stacked in the rear. But in his anger and because he was anxious to return to work he ignored this. He was then arrested.

[4] The appellant's nephew, Mr Themba Mlambo, was called as a defence witness. He confirmed the main elements of the appellant's version. He testified that a friend, Sipho Khumalo, asked him to transport a television set to Khumalo's parents' home in Bergville, KwaZulu-Natal. He undertook this task for a fee,

appropriating his uncle's car without his permission. After the television set was delivered, Sipho remained in Bergville because his father was ill. But he asked Mlambo to transport a cargo back to Gauteng, loading the car himself. Mlambo smelt an unusual odour. He then established that it was dagga. For this he demanded an extra R500 from Sipho. Near the tollgate the vehicle broke down. He called his uncle. Events ensued as the appellant described. After his uncle drove off, Mlambo returned to Gauteng by minibus taxi. Sipho he saw only once again: he is now untraceable.

[5] The regional magistrate disbelieved the appellant. He pointed to a number of improbabilities in his version. He concluded that the state had proved beyond reasonable doubt that the appellant himself was guilty of dealing in dagga. In his judgment Hattingh J, noting that the abolition of the statutory presumptions about dealing had not led to the abolition of logic and common sense, confirmed the appellant's conviction.

[6] The improbabilities inherent in the exculpatory account related by the appellant and Mlambo in my view justify its rejection as false beyond reasonable doubt. They are principally those relied on by the magistrate. Given the smallness of the vehicle, the size of the load, and the dagga's strongly obtrusive smell, it is highly improbable that the appellant – even supposing that the roadside incident with the

nephew had any foundation in truth – would simply have taken forth the freight without questioning what it was or where it came from. In the light of the evidence of both Masondo and the nephew, the appellant's professed failure to notice any smell was clearly untruthful. This radically undermines his entire account, necessitating the inference that he was himself a dealer conveying his own load to Gauteng.

[7] An additional factor is the appellant's untruthful account of his arrest. According to Masondo the appellant when stopped was acting normally and appeared calm. He showed the appellant the dagga and informed him that he was arresting him for it. He thereupon explained the appellant's constitutional rights, including that he was not obliged to answer any questions or to discuss the case with him. The appellant at no stage offered any explanation for the dagga. Nor did he ever mention Mlambo.

[8] The appellant denied this. He said that after Masondo stopped him and showed him that the bags contained dagga, he tried there and then to give an explanation. But Masondo silenced him and ordered him to get into the patrol van. About an hour later at the police station, when the bags were photographed, the appellant urged Masondo to return to the scene to find Mlambo: Masondo again

Bill of Rights s 35(1)(*a*): 'Everyone who is arrested for allegedly committing an offence has the right – (*a*) to remain silent'.

responded negatively – he dismissed this as nonsense. Only later, when inspector Mokoena from the local narcotics bureau arrived, was he informed of his right to remain silent. It was then that he decided to remain silent. (Mokoena testified that the appellant in fact told him that he was with a person, whom he at no stage named, when arrested; but neither side made anything of this.)

[9] In convicting the appellant, the magistrate and the high court by implication accepted Masondo's evidence regarding the arrest. In my view this was correct. Masondo was a scrupulous witness who gave a full and coherent account while willingly conceding lack of recollection or uncertainty on certain aspects. It is highly unlikely that Masondo would have wanted to or have been able to silence the appellant had he tried to relate the story of his nephew, particularly since it entailed that a perpetrator stranded on the highway just a short distance away could be brought to book.

[10] The appellant's belated attempt to assert that he tendered an explanation to Masondo underscores the improbability of his account. It reveals his own perception that, had the story been true, it would have been in his best interests to communicate it promptly to Masondo. This is no more than logical. An exculpatory explanation, readily proffered at arrest, and capable of speedy verification, may save both arrestor and arrestee a great deal of unnecessary trouble.

That in these particular circumstances the appellant, though in fact telling Masondo nothing, later falsely claimed the contrary, contributes to the inference that all the principal elements of his account in court – nephew, odourless car, and circumstances of arrest – were fabricated.

[11] This is not to infer the appellant's guilt from his exercise of the right to silence.[3] It is rather to infer it from his untruthful later assertion that he waived it.

Value of the dagga seized

[12] For a minimum sentence to apply to an individual drug dealer acting alone who is not a law enforcement officer, the contraband must exceed R50 000 in 'value'.[4] The legislature specified a monetary figure, and not a weight, presumably because illegal drugs vary so greatly in value. A car-load of dagga may be worth less than a small packet of heroin or cocaine. But this entails that the State must prove the value of the contraband seized – a more exacting task than proving its weight. And it must prove value not by showing

[3] Compare *S v Thebus and another* 2003 (6) SA 505 (CC) per Moseneke J (Chaskalson CJ and Madala J concurring) paras 57-59 ('In our constitutional setting, pre-trial silence of an accused person can never warrant the drawing of an inference of guilt', but distinguishing a credibility finding connected with an accused's election to remain silent); Goldstone J and O'Regan J (Ackermann J and Mokgoro J concurring) para 87 ('If the warning does not inform the accused that remaining silent may have adverse consequences for the accused, the right to silence as understood in our Constitution will be breached'); Yacoob J para 97(h) ('Drawing an inference as to guilt or credibility solely from the silence of the accused would render a trial unfair'). Ngcobo J (Langa J concurring) paras 117-126 held that on the facts the right to pre-trial silence did not arise.

[4] The provision is set out in footnote 2 above.

a notional or abstract or potential value, but the value of the drugs *to the dealer*, whether at the place of seizure, or at the dealer's intended point of sale. This has particular practical relevance when drugs in large volume are seized.

[13] In *S v Legoa*[5] this court held that 'value' in the minimum sentencing legislation means 'market value', and that this entails that a court asked to apply a minimum sentence should establish what could be obtained for the thing in question. *Legoa* held that it was incorrect to assume that dagga in bulk has the same value as dagga sold in small quantities. It was therefore wrong to conclude that the dagga there – which weighed 216.3 kg, but was stashed into twenty bags each weighing somewhat more than 10 kg – should be valued at its street worth of R1 per gram.

[14] In the present case, the State called the investigating officer, detective inspector Mokoena of the Narcotics Bureau, to prove the value of the dagga. He testified that dagga traded at R1 for one gram. This was based on two sales he concluded in Harrismith. Cross-examined, Mokoena agreed that dagga was sold in bulk in Lesotho and KwaZulu-Natal. He was not sure of the price of a bag. He conceded the existence of a 'sales hierarchy', involving bulk purchases from the producer, with smaller and smaller quantities

[5] 2003 (1) SACR 13 (SCA).

being sold ‘down’ the sales chain, with each vendor making a profit, until the dagga changes hands on the street.

[15] The dagga in the appellant’s car weighed 160kg. It was stashed in ten bags. On average each weighed about 16kg. The state led no evidence as to what a bag of dagga weighing 16kg would fetch. Nor did it lead evidence of what a car-load of dagga weighing 160kg was worth. Mokoena reacted uncertainly when the defence put to him that a ‘bag of dagga’ (of unspecified weight) fetched between R200 and R400. But he did not deny it. If that is so (and the question was not explored), the car-load in this case would have been worth between R2000 and R4000.

[16] In accepting instead that the dagga should be valued at R1 for each gram, the regional magistrate and the high court did not address this question: what was the value of the dagga to the dealer where it was found, and in the condition in which it was found? Instead, they ascribed to it a notional value at some future point in the process of supply and distribution and sale. They assigned to the dagga seized the value it might have when passed on, parcelled up, distributed and sold on the street. This attributed to the appellant means and enterprise and connections that nothing in the evidence suggested he had. The dagga was not on the street when it was seized. Nor was it in 160 000 one-gram parcels. It was found in

transit in a bulk load on a road in the north-eastern Free State. It had not been separated, rolled, parcelled and packaged. There was not a ready supply of willing buyers of one-gram parcels of dagga at hand, let alone 160 000 of them.

[17] There are further considerations indicating that in the approach the regional court and high court adopted is erroneous. In *Legoa*, though this evidence is not reflected in the judgment, the police expert conceded that consignments of dagga differed in quality, and that quality determines value. What is more, the time of the year in which the dagga is offered for sale also affects its value. So quality and seasonal considerations affecting bulk trading may also affect the applicability of the minimum sentences. Neither of these obvious factors was canvassed in the evidence here.

[18] So the approach applied in the courts below cannot be correct. It does not accord with a realistic approach to market value, nor with common law authority, which indicates that when market value is in issue it must be determined on the basis of the price that can be obtained at the time and place relevant to the object in question, and not at some future time or location.[6]

S v Legoa, appeal 33/2002, evidence of Capt van Niekerk at vol 1 page 21 of the record: 'Die gehalte bepaal wat die waarde is'.

[6] Voet 18.5.7 [(Gane's translation): 'That price is to be borne in mind which was at the time of sale just in the place at which the sale was solemnized; and not that which is suitable to the thing at the time when suit is brought. This is to prevent sales being otherwise rendered void in a host of ways, since both are there varying prices for things in individual states, and prices wax and wane from day to day in accord with the differing views of humankind, the scarcity or abundance of things and other circumstances. As Seneca rightly said "The price of everything is a matter of the time"'], applied in

[19] This case does not require us to decide whether the bulk value of the dagga must be determined at the place where it is seized, or at the point where the dealer was heading with the intention of selling it. The value in this case was not proved on either assumption. It follows that the minimum sentencing legislation was not applicable.

The appropriate sentence

[20] The regional magistrate did not sentence the appellant to the minimum term of fifteen years. He found escape in the existence of substantial and compelling circumstances. This was the appellant's first drug-dealing offence. (He had a number of other convictions; but the most recent dated to 1987, and the magistrate rightly attached little weight to them.) The appellant was in responsible employment as a foreman at the Ekurhuleni Municipality. He had eight children to support. His wife died after the events in issue, and some of his children needed counselling to deal with problems arising from her death.

[21] Considering that the minimum sentencing legislation was applicable, the magistrate took the fifteen-year term of imprisonment as his starting point. This undoubtedly affected the sentence he imposed. Since the minimum sentence is not applicable at all, we

McGee v Mignon 1903 TS 89 97 and *Katzoff v Glaser* 1948 (4) SA 630 (T) 636-8.

must impose sentence afresh. Counsel for the State drew our attention to sentences imposed in the Free State high court in comparable cases of dealing, and submitted that it would be appropriate to consider a sentence of approximately four years. In my view, having regard to the appellant's personal circumstances, his absence of remorse, the weight of the dagga, and sentences imposed in comparable cases,[7] a sentence of four years' imprisonment should be imposed.

Order

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence imposed by the regional court is set aside. In its place there is substituted:

   'The accused is sentenced to four years' imprisonment.'

E CAMERON

[7] In *S v Caleni* 1990 (1) SACR 178 (C), a first offender pressurised into conveying [and thus dealing in] 800kg was sentenced to six years' imprisonment, of which two were suspended; in *S v Seoela* 1996 (2) SACR 616 (O), a first offender dealing in 24kg of dagga was sentenced to a fine of R3 000 or 12 months' imprisonment, with a further 18 months suspended; in *S v Hlongwane* 1998 (1) SACR 221 (O), a 35 year old first offender was sentenced to four years' imprisonment, half of which was suspended, for dealing in 148,25kg of dagga; in *S v Heilig* 1999 (1) SACR 379 (W) a first offender received a three-year suspended sentence, plus a fine of R5 000 or 12 months' imprisonment, for dealing in 20 kg of dagga; in *S v Legoa* 2003 (1) SACR 13 (SCA), a sentence of five years' imprisonment for dealing in 216,3kg of dagga [erroneously reflected at 2003 (1) SACR 17*a-b* as '261,3' kg] was imposed on a first offender.

JUDGE OF APPEAL

CONCUR:
CONRADIE JA
VAN HEERDEN JA