THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Case no: 33/2002
1.2 REPORTABLE

In the matter between:

LEGOA, Michael Appellant

and

THE STATE Respondent

Before: Vivier JA, Streicher JA, Cameron JA, Brand JA and Lewis AJA
Heard: Friday 13 September 2002
Judgment: Thursday 26 September 2002

Criminal law – Dealing in dagga – Minimum sentencing legislation, Act 105 of 1997 – (i) Meaning of 'value' – (ii) State must prove elements of the form of offence contemplated in Schedule before conviction

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JUDGMENT

CAMERON JA:

[1] This is an appeal, with leave granted by this Court, against the Eastern Cape High Court's dismissal of an appeal against a

fifteen-year minimum sentence imposed in a regional court for dealing in dagga valued at more than R50 000. Two questions are in issue: the meaning of 'value' in the minimum sentencing legislation; and whether at the trial of an accused charged with dealing the state is entitled prove the value in question after conviction but before sentencing, so as to invoke the minimum sentences.

[2] On 6 June 1999 the appellant, then twenty-five years old, was arrested near Aliwal North on the Lady Grey/Sterkspruit road. He was found driving a motor vehicle belonging to his mother, stashed with 261,3 kilograms of dagga (cannabis). Soon after, in the Regional Court at Aliwal North, he was charged with dealing in a prohibited substance in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 ('the 1992 Act).[1] On the main

[1] Section 5 of the 1992 Act prohibits dealing in dependence-producing, dangerous dependence-producing or undesirable dependence-producing substances. Sub-sections 13(e) and (f) make contravention of the prohibition on dealing a criminal offence. Section 5 provides (subject to exceptions not relevant) 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'.

count (there was an alternative count of unlawful possession) the charge sheet read (my translation from the Afrikaans):

> 'That the accused is guilty of the offence of contravening section 5(b) read with sections 13(f), 17(e), 18, 19, 20, 21, 25 and 64 of Act 140 of 1992 in that on or about the 6 day of June 1999 at or near Lady Grey Sterkspruit main road in the district of Aliwal North the accused wrongfully and unlawfully dealt in an undesirable dependence-producing substance as contemplated in Schedule 2 of Part III [of] Act 140 of 1992 namely 216,3 kg (cannabis – dagga).'

[3] In a written plea of guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977[2] the appellant, who was legally represented, pleaded guilty to the main count. His statement recited all the statutory and factual particulars in the charge sheet. It added that, in return for an expected payment of R1 000, the appellant had been 'hired by a certain lady', whose names were to him unknown, to convey the dagga from the Lesotho border to Aliwal North. There 'he would have handed the dagga to the lady for further distribution and sale by her'. The correct weight of the dagga was admitted as 216,3 kg. There was no admission regarding value.

[4] The State accepted the averments and facts set out in the

[2] Section 112(2) provides that 'If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

appellant's plea. The statement was handed up to the presiding magistrate and the appellant was convicted as charged. Thereafter the prosecution indicated that it would prove no previous convictions, but requested a postponement 'to lead further evidence in aggravation of sentence'.

[5] Both the charge sheet and the admission of guilt made express mention of the applicable penalty provision in the 1992 statute, namely s 17(e). This specifies for dealing in dangerous or undesirable dependence-producing substances a maximum sentence of 25 years' imprisonment, or 'both such imprisonment and such fine as the court may deem fit to impose'. But at the time the appellant was charged that provision had been superseded. In 1997 Parliament adopted minimum sentences legislation in respect of such dealing. The Criminal Law Amendment Act 105 of 1997 ('the 1997 Act') s 51(2)(a)(i) now specifies that in the absence of 'substantial and compelling circumstances' justifying 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. The portion of the

Schedule in question specifies 'Any offence referred to in s 13(f)' of the 1992 statute –

> '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.' [3]

[6] Despite defence opposition, the postponement sought was granted. When the trial resumed, the State called the police officer commanding the South African National Narcotics Bureau (SANAB) at Queenstown, Capt van Niekerk, to testify about the value of the dagga in question. He produced a nationwide survey of the approximately two-score SANAB units, of which nine were in the Eastern Cape. Five of the Eastern Cape units had indicated (consonantly with the findings of the survey as a whole) that dagga had a street value of about R1,00 per gram. One had shown a value of R5,00 per gram, while another had shown R0,50 per gram. Returns from two of the Eastern Cape SANAB units, including the Aliwal North unit, were not shown. Van Niekerk

[3] The 1997 Act's minimum sentencing provisions were brought into effect on 1 May 1998. Their operation has from time to time been extended, most recently from 1 May 2001 for a further two years (Proc R29 in GG 22261 of 30 April 2001).

added that in his sixteen years in SANAB, it had always been accepted, and his personal experience confirmed, that the street value of dagga had remained relatively static at R1,00 per gram, or R1 000,00 per kilogram. He emphasised that this was the value of the dagga when sold at its 'final destination'.

[7] Under cross-examination, Van Niekerk confirmed that in estimating the value of the dagga in issue he had in mind its value as sold by the street dealer to the street consumer. He expressly agreed that its value to the producer would be 'much, much lower' than R1,00 per gram. The weight seized in the appellant's possession constituted, he agreed, about 20 raw bags. This would be worth to the producer no more than R300,00 to R1 000,00 per bag (though on occasion perhaps more). The total value of the dagga seized would be at most between R15 000 and R20 000.

[8] In the regional court the only disputed issue was the value of the dagga. The magistrate found that the state had established the 'potential value' of the dagga as R1,00 per gram. Despite Van

Niekerk's concessions, he held that the only feasible approach was potential value. While it was true that the price obtained for a consignment could vary, it was up to an accused to convince a court that any other value applied. In the absence of substantial and compelling circumstances, the appellant therefore had to be sentenced to fifteen years' imprisonment.

[9] On appeal to the Eastern Cape High Court, a second ground was argued – that the appellant had not been 'convicted' of a scheduled offence as contemplated in the 1997 Act. On the first issue, the Court (Chetty J, Pillay J concurring) held that 'value' must be given 'a meaning that could be applied to the ordinary everyday facts associated with the illegal drug trade'. Since the intended target was the end user, it was the street value that must apply. On the second point, the Court held that 'the value of the dependence-producing substance is entirely irrelevant prior to conviction', and that the state did not have to prove value before conviction. For the reasons that follow, both conclusions are in my view wrong.

'Value' in the minimum sentencing legislation

[10] Nearly a century ago Innes JA observed that the principle 'that the value of an article is, as a general rule, what it will fetch' was well recognised. Accordingly, 'the aim should be to estimate what could be obtained for it; not what it cost or what its utility to the owner would be worth'.[4] 'What it will fetch' relates of course to market value, which Innes JA went on to describe as 'the most uniform test, and the one easiest of practical application.'

[11] 'Market value', notoriously, means the price a willing buyer pays a willing seller in an open market. In the present case, the magistrate and the Eastern Cape Division implicitly accepted this. But the error they made was to assume that dagga sold in bulk and dagga sold in small quantities of 1 gram would sell at the same price per gram. The conclusion is at odds with common sense. In any event there is no evidence to support the assumption. In fact the evidence is to the contrary. The dagga was in twenty bags, each therefore weighing somewhat more than 10kg. Capt van Niekerk testified that the value of such a bag

[4] *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 515. See too de Villiers JA at 522.

was between R300 and R1000. At most, therefore, the dagga was worth R20 000. It may have been worth considerably less – in any event, nothing even close to the R50 000 the minimum sentencing legislation prescribes.

[12] On this ground alone the sentence imposed on the appellant was incompetent. Although this conclusion is sufficient to dispose of the appeal, the course the proceedings took in the courts below and the conclusions those courts reached on the second issue necessitate further examination.

Can the State prove the value of the dagga after conviction?

[13] The 1997 minimum sentencing legislation requires for its application that an accused must have been 'convicted of an offence referred to' in the Schedule.[5] In this case the offence 'referred to' in the Schedule is that of dealing in a dangerous dependence-producing substance '*if it is proved that – (a) the value of the dependence-producing substance in question is more than R50 000,00*'. The question is whether the High Court's

[5] The wording of the 1997 statute was amended, in respects immaterial to this appeal, by Act 62 of 2000.

conclusion that the value of the substance in question relates solely to the question of sentence and is irrelevant before conviction, is correct.

[14] In my view for three principal reasons it is not. First, the High Court's conclusion flies in the face of the wording of the 1997 statute. That wording in my view clearly indicates that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule. (This does not apply when the Schedule specifies an attribute not of the offence, but of the accused, such as rape when committed 'by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions'.)[6] Second, even if the wording of the statute were open to more than one interpretation (which in my view it is not) the grave injustice that the contrary interpretation can cause compels the conclusion that the elements of the offence must be established before conviction. Third, the High Court's conclusion is contrary to established principle and practice in our criminal trial courts.

[6] Act 105 of 1997, Schedule 2, Part I

[15] It is an established principle of our law that a criminal trial has two stages – verdict and sentence. The first stage concerns the guilt or innocence of the accused on the offence charged. The second concerns the question of sentence. Findings of fact may be relevant to both stages. However, those in the first stage relate to the elements of the offence (or the specific form of the offence) with which the accused is charged. Those in the second mitigate or aggravate the sentence appropriate to the form of the offence of which the accused has been convicted.

[16] The application of this principle was complicated, but its essence not affected, when the death sentence was compulsory for murder without extenuating circumstances.[7] In such trials, the finding as to extenuation related to the first stage (the verdict), though two phases were required within the first stage, since the onus to prove murder beyond reasonable doubt rested on the State, while the onus of establishing extenuating circumstances

[7] Section 277 of the Criminal Procedure Act 51 of 1977 was amended to abolish the compulsory death sentence for murder without extenuating circumstances by s 4 of the Criminal Law Amendment Act 107 of 1990, which came into operation on 27 July 1990.

on balance of probabilities rested on the accused.[8] This meant that, once verdict had been pronounced on the accused's guilt or innocence (including in an appropriate case murder with or without extenuating circumstances), the question of sentence was one for the judge alone, and not for the assessors.[9]

[17] Where the accused was charged with robbery, the question whether the robbery was committed with aggravating circumstances had to be determined as part of the verdict – that is, as part of the court's finding on guilt or innocence in the first stage. The aggravating circumstances were elements of the form of the offence of robbery with which the accused was charged. Hence they had to be proved in the first stage of the trial, and the finding regarding their presence or absence was part of the main verdict. Their presence or absence accordingly had to be decided by the judge with the assessors (or, before the abolition of juries,[10] by the jury).[11]

[8] *S v Sparks* 1972 (3) SA 396 (A) 404.
[9] *S v Lekaota* 1978 (4) SA 684 (A).
[10] By the Abolition of Juries Act 34 of 1969.
[11] *S v Jacobs* 1961 (1) SA 474 (A), *S v Sparks* 1972 (3) SA 396 (A) 404.

[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence.[12] The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed '(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions'.)[13]

[12] *S v Moloto* 1982 (1) SA 844 (A) 850C-D, per Rumpff CJ: 'Roof, of poging tot roof, met verswarende omstandighede is nie 'n nuwe sort misdaad wat deur die Wetgewer geskep is nie. Dit bly steeds roof, of poging tot roof, maar volgens art 277(1)(c) [of Act 51 of 1977] van verleen die aanwesigheid van verswarende omstandighede aan die Verhoorregter 'n diskresionere bevoegdheid om by skuldigbevinding die doodvonnis op te le.'

[13] Act 105 of 1997, Schedule 2, Part I

[19] A related though distinct question, which has long caused complexity,[14] has been whether the charge sheet should include reference to the elements of the specific form of the offence with which the accused is charged. This Court has in the past held that it is desirable but not essential that the charge sheet should set out those elements. *R v Zonele and others*[15] was decided shortly after the Criminal Procedure Act 56 of 1955 was amended to make competent the sentence of death if 'aggravating circumstances' were found in cases of robbery or housebreaking with intent to commit an offence. In remarks that have a signal bearing on the proceedings in the present case, Ramsbottom JA (with whom Rumpff AJA concurred) said:

> 'Although the presence of aggravating circumstances affects sentence only, it is of great importance that a person charged with robbery or with housebreaking with intent to commit an offence should be informed, in clear terms, that the Crown alleges and intends to prove that aggravating circumstances were present.
> It is desirable that the facts which the Crown intends to prove as constituting aggravating circumstances should be set out in the indictment, as was done in the present case. Without laying down any rule, I venture to suggest, for the consideration of Attorneys-General, that it might be good practice to go further and, in addition, to allege specifically that the accused is charged with robbery (or with housebreaking with intent to commit an offence) in which aggravating circumstances were present. …
> When an accused pleads guilty to either of these charges, and it appears from the indictment that the Crown intends to prove that aggravating circumstances were present, the presiding Judge will, of course, satisfy himself that the accused intends to admit not only that he is guilty of the

[14] See *ex parte the Minister of Justice: in re R v Masow and Another* 1940 AD 75.
[15] 1959 (3) SA 319 (A).

> offence charged, but also that the aggravating circumstances were present. Unless the facts alleged to constitute aggravating circumstances are formally admitted they must be proved, and it is, naturally, essential that the exact extent of the admissions should be ascertained. …
> It is hardly necessary to remark that even though the accused has pleaded guilty the presiding Judge has the inherent power to enter a plea of not guilty if for any reason he deems it advisable in the interests of justice to do so.' (323B-F)

[20] Under the common law it was therefore 'desirable' that the charge sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not however essential.[16] The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force'.[17] The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said,[18] is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision.[19] One of those specific rights is 'to be informed of the charge with sufficient

[16] See too *S v Moloi* 1969 (4) SA 421 (A) 424A-C, per van Winsen AJA.

[17] *S v Zuma and others* 1995 2 SA 642 (CC) para 16, drawing a contrast with *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) 377; and see *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 22, per Kriegler J.

[18] *S v Zuma and others* 1995 2 SA 642 (CC) para 16.

[19] Constitution s 35(3)(a) to (o).

detail to answer it'.[20] What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet.

[21] The matter is however one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up.[21] The accused might in any event acquire the requisite knowledge from particulars furnished to the charge[22] or, in a superior court, from the summary of

[20] Constitution s 35(3)(a).
[21] See the remarks of Borchers J in *S v Blaauw* 1999 (2) SA 295 (W) at 301*h*-302*b*.
[22] Section 87 of the Criminal Procedure Act, 51 of 1977, read with s 85(1)(d).

substantial facts the State is obliged to furnish.[23] Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.

[22] The question thus remains whether the accused had a fair trial under the substantive fairness protections afforded by the Constitution. In this regard, the judgment of the Full Court of the Transvaal Provincial Division in *S v Seleke*,[24] though delivered before the Constitution, remains instructive. The Full Court held under the provisions of the Dangerous Weapons Act 71 of 1968 that although it was desirable for the charge to contain reference to the penalty, this was not essential, and its omission not irregular: the test was whether the accused had had a fair trial

[23] Section 144(3) provides: '(a) Where an attorney-general under section 75, 121 (3) (b) or 122 (2) (i) arraigns an accused for a summary trial in a superior court, the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice or the security of the State, as well as a list of the names and addresses of the witnesses the attorney-general intends calling at the summary trial on behalf of the State: Provided that-
(i) this provision shall not be so construed that the State shall be bound by the contents of the summary;
(ii) the attorney-general may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld;
(iii) the omission of the name or address of a witness from such list shall in no way affect the validity of the trial.'

[24] 1976 (1) SA 675 (T) (Cillie JP, Marais and Le Grange JJ).

(681-2). The Full Court observed (my translation from the Afrikaans):

> 'To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.' (682H)

[23] Dealing with the question of verdict, the Full Court held that for the enhanced penalty provisions to be applicable the use of a 'dangerous weapon' as defined had to be proved in the course of the State case against the accused (again my translation):

> 'The use of a "dangerous weapon" as intended in s 4 (1) of the Act must be proved by the State in the course of the State's case. The finding of the trial court that the weapon in fact complies with the description in s 1, can only be made if (a) the accused is timeously, and, in all cases where the accused is unrepresented, with full information about the implications, warned that the State before sentencing will make such a claim; (b) the accused has been granted a proper opportunity to put his side of the case by way of cross-examination, evidence, representations, etc; and (c) the court in considering this aspect through its own examination of the object in question, or, if it is not before court, by descriptive evidence, is sure beyond reasonable doubt that it, objectively speaking, does in fact fulfil the statute's description.
> The emphasis we place on this portion of the proceedings is justified by the drastic difference that it may make to sentence.' (685A-D)

[24] These principles were illuminatingly applied in regard to the 1997 statute's minimum sentencing provisions in *S v Nziyane*.[25] There the scheduled offence was possession of a semi-automatic

[25] 2000 (1) SACR 605 (T) (Botha J, du Plessis J concurring).

weapon, which for a first offender similarly carries a minimum 15-year sentence. The charge sheet averred possession of a Norinco pistol, and specified that this was a semi-automatic weapon. However, in its verdict the trial court, though observing that it was common cause that a Norinco pistol was in general a semi-automatic weapon, failed to make a specific finding to this effect. Only after the conviction was entered did the State lead expert evidence establishing that the pistol the accused possessed was in fact semi-automatic. The Court correctly laid emphasis on the 1997 Act's requirement that the accused must be *convicted* of the scheduled offence. The minimum sentencing provisions therefore did not apply. Although the legislature had not created new offences, it had to appear at conviction that elements in question were present. Botha J observed (I translate):

> 'The words in my opinion convey the meaning that the facts that must be present to make the minimum sentence compulsory must be established at conviction in the sense that they must be included in the facts on which the conviction is based.' (609*d*)

[25] Botha J concluded that the nature of the weapon was *res judicata* after conviction. Where the accused pleads not guilty,

the State's allegation in the charge sheet puts the matter in issue at the trial, so that after verdict the State can no longer lead evidence on this issue (610*b*-*d*). These conclusions seem to me clearly right.

[26] In the present matter, the accused pleaded guilty. The State accepted not only his plea, but the facts set out in his s 112 statement. That statement included express allusion to the penalty provision under the 1992 Act. After the accused was convicted there could thus be no question of applying the minimum sentencing provisions of the 1997 statute. As Holmes JA pointed out in *S v Sparks* –

> 'Indeed, on a plea of guilty being entered, the "trial" ends, since there are then no further issues to be tried in regard to verdict …'[26]

[27] The issues affecting verdict in the present trial were thus concluded when, after the State had accepted the appellant's plea, the Court found him guilty on the basis of it. The appellant was not warned that the minimum sentencing legislation might be invoked. In fact, the charge sheet misled him as to the applicable penalty by referring only to the 1992 Act. The trial court, in

[26] 1972 (3) SA 396 (A) 404C-D.

convicting him, did not question him or satisfy itself (as enjoined by Ramsbottom JA) as to the elements of the form of the offence to which he was pleading guilty. It was therefore highly unfair to confront the appellant thereafter with the minimum sentences. More signally, the trial Court in any event lacked jurisdiction entirely to impose the minimum sentence.

Sentence

[28] The sentence imposed on the accused must therefore be set aside. The accused has been in custody since his arrest on 6 June 1999. He was sentenced on 27 August 1999. In view of the sentence I consider appropriate under the penalty provisions of the 1992 statute, the further delay caused by remitting the matter to the trial court to impose sentence itself would be unfair to the accused.

[29] Given the amount of dagga, the appellant's avowedly intermediary role in its transportation, his clean record, and the remorse indicated by his plea of guilty, I am of the view that a sentence of five years' imprisonment would be adequate.

Order

[30] The following order is made:

1. The appeal succeeds.
2. The sentence imposed on the appellant is set aside.
3. In its place there is substituted:

   'The accused is sentenced to five years' imprisonment, antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to the date on which he was originally sentenced, 27 August 1999.'

E CAMERON

JUDGE OF APPEAL

VIVIER JA)
STREICHER JA) CONCUR
BRAND JA)
LEWIS AJA)