

imprisonment for not less than one year or more than five years, and to a fine of not less than P1500 or more than P5000, or in default of payment thereof to imprisonment for not less than one year or more than five years:"

The magistrate sentenced the appellant, who is 28 years old and a first offender, to 4 years imprisonment and, in addition, to a fine of P2500 or in default of payment to 2 years imprisonment to run consecutively to the 4 years imprisonment.

The appellant appealed unsuccessfully to the High Court against the sentence. He now comes on appeal with the leave of the High Court to this Court. Mr. Mhandu for the Attorney General this morning told this court that he could not support the sentence. Although the amount of dagga viz 4.2 kg is undoubtedly large, the sentence, so Mr. Mhandu conceded, was disproportionate to the gravity of the offence and was excessive, which is, of course, one of the grounds upon which a Court of Appeal can interfere with the sentence of an inferior court. I agree with Mr. Mhandu. The magistrate's sentence is close to the maximum provided for in Section 16 (3). As stated by Dendy Young JA in Mahomed v. The State 1984 BLR 78 CA at p 82 C - D

"The maximum penalty is normally reserved for the most serious cases, "

One must also have regard to the totality of the punishment. Additional to the 4 years imprisonment a P2500 fine or in default 2 years imprisonment seems to me to be excessive even taking into account that 4.2 kg is a large amount of

dagga. The magistrate seems to have been influenced by the fact that appellant, a Zambia citizen, is a foreigner. In sentencing appellant he said the following:

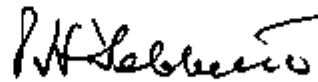
"The illegal importation of dagga into Botswana by foreigners, particularly people from neighbouring countries, is a cause for great concern."

The magistrate was of course quite entitled to express the concerns he had but in imposing what was close to the maximum penalty provided by the legislature, his sentence was in my view excessive and cannot stand.

In the circumstances the conviction is confirmed but the sentence of the magistrate is set aside and substituted with the following sentence:

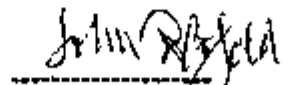
2 years imprisonment plus a fine of P2000 or in default of payment 18 months imprisonment to run consecutively to the 2 years imprisonment which is backdated to 20th December 1998.

DELIVERED IN OPEN COURT THIS 5TH DAY OF JULY 2001.

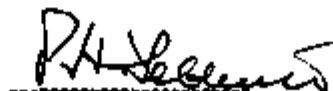


P.H. TEBBUTT
ACTING PRESIDENT

I AGREE:


SIR JOHN BLOFELD
JUDGE OF APPEAL

I AGREE:


F.H. GROSSKOPF
JUDGE OF APPEAL