IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR222/2009

In the matter between:

MBUYSWA XABADIYA First Appellant

MBONGENI MATYALENI Second Appellant

and

THE STATE Respondent

ORDERS

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[1] The appellants' appeal against their conviction and sentence is dismissed.

[2] The conviction and sentences imposed on the appellants by the trial court is confirmed.

JUDGMENT

HENRIQUES J [CHETTY S AJ CONCURRING]

Introduction

[1] The appellants were charged with dealing in dagga in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act). In the alternative, the appellants were charged with possession of 387.2 kilograms of dagga in contravention of s 4(b) of the Drugs Act.

[2] On 18 June 2008, the appellants were convicted on the main count and sentenced to seven years' direct imprisonment. Leave to appeal against both the conviction and sentences imposed were granted on 12 December 2008.

[3] It would appear that the hearing of the appeal was delayed as the orders in the court file reflect that the appeal record had to be reconstructed on several occasions. In addition, the appellants changed attorneys of record.

Issues in the appeal

[4] The issues in this appeal are the following:

[4.1] Whether the respondent discharged the onus of proving the guilt of the appellants beyond reasonable doubt, in that the respondent relied on the evidence of a single witness, police reservist Leon David Manuel;

[4.2] Whether the sentence imposed is disturbingly or shockingly inappropriate warranting the appeal court interfering with the sentences

imposed.

[5] The respondent relied on the evidence of Leon David Manuel and Jacobus Prinsloo. Manuel testified that on 11 February 2006, a road block was in force on the national road in the Nolangeni area leading towards Kokstad. This was a joint effort between the South African Police Services (SAPS) and the South African National Defense Force (SANDF). At approximately 22h30, a Toyota bakkie approached the road block and the driver drove through the road block without stopping when instructed to do so. The SANDF members opened fire and stopped the vehicle by shooting at the tyres of the vehicle. The occupants of the vehicle fled the vehicle when it came to a stop. The first and second appellants, who were the occupants of the vehicle, were subsequently arrested and escorted back to their vehicle at the road block.

[6] During a search of their vehicle, dagga was discovered in bags at the back of the bakkie. At the time the appellants indicated that they were under the impression that they were transporting second hand goods and were unaware that it was dagga. They were then taken to the community service centre. During the course of cross-examination, Manuel conceded that the appellants were assaulted by the SANDF members at the road block and he intervened to stop the assault. With regard to what transpired at the road block and the arrest of the appellants, Manuel was a single witness.

[7] Jacobus Prinsloo, of the Organised Crime Unit in Port Shepstone, testified that he received a call from the Kokstad Police on the morning of 13 February 2006,

and on his arrival at the Kokstad Police Station, the first and second appellants were identified as having been arrested in relation to the dagga that was seized from the bakkie. He proceeded to the strong room where the dagga was being stored and took samples from each of the bags in the presence of the appellants. These samples were subsequently sent to the forensic science laboratory for testing and tested positive for dagga. That was the respondent's case.

[8] An application in terms of s 174 of the Criminal Procedure Act 51 of 1977 (CPA) was bought but was subsequently refused and the appellants testified. The first appellant testified that he was telephoned by the second appellant concerning a delivery which they needed to make. The second appellant had obtained the goods and arranged for payment for the transport of such goods. He agreed with the second appellant that one of his vehicles could be utilized to transport the goods. When he did not hear from the second appellant after a long period of time had passed, he called the second appellant who informed him that there was a problem with the immobilizer of the vehicle. The first appellant then telephoned Andile Ncgwane at about 19h00 to retrieve a spare key and immobilizer for the bakkie. He then handed the spare key and immobilizer to the second appellant, but decided to make the delivery on his own as the second appellant was still experiencing difficulty in starting the vehicle.

[9] The first appellant testified that he did not know what items they were transporting and was under the impression that they were transporting second hand goods. When he saw the road block he stopped. At the road block he was asked if he was in possession of pork, to which he responded 'no' and he was then told to

proceed. As he drove away he heard shouting and someone opened the canopy of the bakkie. He stopped the bakkie and whilst talking to one of the SANDF members, he was asked to alight from the bakkie and lie on the ground where he was then assaulted. He was informed that he was transporting dagga in the bakkie. He however was not shown the dagga as he was being assaulted at the time.

[10] The second appellant corroborated the first appellant's version of events when he testified. He testified that a consignment of second hand goods was loaded onto the bakkie. He was not present at the time that the goods were being loaded and did not see what was loaded into the back of the bakkie. The difference in the two appellants' versions relates to what transpired at the road block. The second appellant indicated that the first appellant had threatened to lay charges against members of the SANDF.

Conviction

[11] In his judgment, the magistrate rejected the versions of the first and second appellants as not being reasonably possibly true. The magistrate accepted the evidence of the single State witness, Leon David Manuel who he found to be truthful and reliable.[1]

[12] In *S v Shackell*,[2] Brand AJA (as he then was) held:

> 'It is a trite principle that in criminal proceedings the prosecution must prove its case

[1] Appeal Record page 119 at lines 20 – 25.
[2] 2001 (4) SA 1 (SCA) para 30.

beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[13] In *Mlendile v S*,[3] Kubushi AJ held at paragraph 9:

'In terms of section 208 of the CPA an accused may be convicted on the evidence of a single competent witness. In **S v Sauls & Others** 1981 (3) SA 172 (A) at 180H it was noted that the absence of the word "credible" (in section 208) is of no significance; the single witness must still be credible. There is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The question is what weight, if any, must be given to the evidence of a single witness.'

[14] In paragraph 10 of the judgment Kubushi AJ points out:

'The correct approach in determining the guilt of an accused is as pointed out in **S v Chabalala** 2003 (1) SACR 134 (SCA) 139i-j to 140a, to weigh up all the elements which points towards the guilt of the accused against all that are indicative of innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide

[3] [2011] ZAFSHC 49 (10 March 2011).

> whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[15] It is not in dispute that on the day in question, the vehicle which was been driven by the first appellant, in which the second appellant was a passenger, was stopped at a road block, and in the vehicle a huge consignment of cannabis (dagga) weighing 387.2 kilograms in total with an estimated street value of R387 200,[4] was found.

[16] If one has regard to the huge quantity of cannabis found, which according to the evidence was contained in 12 white wooven bags, one floral suitcase and two carrier bags,[5] there can be no doubt that the cannabis was intended for sale to the public and could never have been for the personal use of the appellants.

[17] The issue is whether the appellants' version that they were unaware that they were conveying cannabis and were under the impression that they were conveying second hand goods, is, having regard to the totality of the evidence, reasonably possibly true.

[18] I have given careful consideration to the evidence of the State witness, Leon David Manuel and I am satisfied that he was a good, reliable and credible witness and that the learned magistrate was correct in accepting his evidence in preference to the evidence given by the appellants.

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[4] Appeal Record page 33 line 25 to page 34 line 1.
[5] Appeal Record page 32 lines 10 – 15.

[19] The learned magistrate was alive to the fact that he was dealing with the evidence of a single State witness and carefully considered the evidence of the State witness. As such I can find no reason to disturb the learned magistrate's finding that Manuel was indeed a credible witness whose evidence can be safely relied upon to convict both appellants of the main count of dealing in cannabis (dagga).

[20] The appellants' version is inherently improbable and does not have a ring of truth about it. It is highly improbable that both appellants were totally oblivious to the fact that they were conveying such a huge consignment of cannabis. The fact that they failed to stop at the roadblock and attempted to escape lends corroboration to the fact that they were aware that they were conveying cannabis and hence they desired to escape rather than being arrested.

[21] It is common cause that the tyres of the vehicle were shot by members of the South African Defence Force who were also manning the roadblock. In cross-examination, it was put to Manuel that the first appellant will say that the tyres of the vehicle were shot by the soldiers when the first appellant threatened to charge them for assault. In other words, the vehicle's tyres were shot for no apparent reason.[6]

[22] The first appellant, in particular under cross-examination, contradicted the version put to the State witness referred to in paragraph 21 above and said that when the vehicle stopped, two soldiers approached the vehicle and one of them shot the tyres. He then became confused and thereafter he was assaulted.

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[6] Appeal Record page 22 lines 20 - 25 to page 23 lines 1 – 5.

[23] The first appellant's explanation for this patent contradiction is that his legal representative may have made a mistake in so far as the version that was put to the State witness regarding the circumstances under which the tyres were shot was concerned.[7]

[24] The second appellant in his evidence disavowed the version given by the first appellant referred to in paragraph 22 above and maintained that the tyres were shot because the first appellant threatened to charge the soldiers with assault, and in fact said that the version given by the first appellant in his evidence is not true.[8]

[25] If one has regard to the aforegoing there is no doubt that both appellants were untrustworthy and unreliable witnesses and that the learned magistrate correctly rejected their version as not being reasonably possibly true. I see no reason to disturb these findings.

[26] I am therefore satisfied that the State has discharged the onus of proving the guilt of both the appellants beyond a reasonable doubt and that they were correctly convicted of the main count of dealing in cannabis.

Sentence

[27] It is trite that the imposition of sentence falls fully within the discretion of the sentencing court and the court of appeal would only interfere with the sentence in the

[7] Appeal Record page 63 lines 15 – 25.
[8] Appeal Record page 92 lines 10 – 20.

event of an irregularity, misdirection, or where the sentence imposed is strikingly or disturbingly inappropriate.[9]

[28] The appellants are first offenders and no previous convictions were proved. Insofar as the first appellant is concerned, he was self-employed, married with six children, his wife suffers from asthma and he is diabetic.

[29] Insofar as the second appellant, he is the nephew of the first appellant. His mother had recently passed away, he earns income by driving the vehicle of the first appellant and he is single with two children.

[30] In arriving at the sentence imposed on the appellants of seven years' imprisonment, the learned magistrate took into account their personal circumstances, the seriousness of the offence, the prevalence of the offence and what he refers to as 'the scourge of drug abuse among the schoolchildren'.[10]

[31] The learned magistrate was also conscious of the fact that a court will not likely or easily send a first offender to prison; however, in view of the gravity of the offence and the huge consignment of cannabis found, the learned magistrate concluded that a term of imprisonment was the only appropriate sentence.

[32] In *S v Sithole*,[11] the appellant was arrested at a roadblock and found in

[9] *R v Mapumulo & others* 1920 AD 56 at 57; *S v Rabie* 1975 (4) SA 855 (A) at 857D-E; *S v Shaik & others* 2008 (5) SA 354 (CC) para 66.
[10] Appeal Record page 130 line 3.
[11] [2004] ZASCA 77 (16 September 2004.

possession 160 kilograms of cannabis. The appellant was convicted of dealing in cannabis and sentenced to seven years' imprisonment which was reduced to five years' imprisonment by the Supreme Court of Appeal.

[33] In *Legoa v S*,[12] the appellant was arrested whilst driving a vehicle belonging to his mother in which 261.3 kilograms of cannabis was found. The appellant was a first offender with no previous conviction and was sentenced to 15 years' imprisonment which was reduced on appeal by the Supreme Court of Appeal to one of five years' imprisonment.

[34] In this matter the quantity of cannabis considerably exceeds the quantity of cannabis found in possession of the appellants in the cases referred to in paragraphs 32 and 33 above. In both the cases the appellants were first offenders and notwithstanding same, were sentenced to direct terms of imprisonment without the option of paying a fine.

[35] I am satisfied that the learned magistrate correctly applied his mind to all the relevant factors in this matter and that the sentence of seven years' of imprisonment is an appropriate sentence and I see no reason to interfere with it.

Conclusion

In the circumstances I propose that the following Orders should be made:

[12] [2002] 4 All SA 373 (SCA).

i) The appellants' appeal against their conviction and sentence is dismissed.

ii) The conviction and sentence imposed on the appellants by the trial court is confirmed.

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HENRIQUES J

I AGREE

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CHETTY S AJ

Case Information

Date of argument	:	13 and 26 September 2012
Date judgment reserved	:	25 September 2012
Date judgment delivered	:	25 May 2017

Appearances

Counsel for Appellants	:	Mr K L Singh
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for State	:	Adv B Manyathi
Instructed by	:	Director of Public Prosecutions, Pietermaritzburg