THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

HIGH COURT REF NO: R16/2023
MAGISTRATE CASE NO. P149/2023
MAGISTRATE SERIAL NO. 01/2023

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) OF INTERESTS TO MAGISTRATES: YES
(4) REVISED.

[redacted]

16 September 2024
DATE SIGNATURE

In the matter between:

THE STATE

And

CELUCOLO MICHAEL MKHONZA **(THE ACCUSED)**

REVIEW JUDGMENT

RATSHIBVUMO ADJP

[1]. This matter was first placed before Kgoele J (as she then was) for review, in terms of section 302 of the Criminal Procedure Act, no. 51 of 1977 (the

Criminal Procedure Act). This was after the conviction and the sentence of the accused by the Magistrate for the District of Chief Albert Luthuli, sitting in Mayflower. The accused was convicted of dealing in drugs (dagga) in contravention of section 5(b) of Act 140 of 1992 (the Drugs and Drug Trafficking Act). Following the conviction, and on 10 May 2023, he was sentenced to 3 (three) years imprisonment, which was conditionally suspended for a period of 5 (five) years. A further sentence of a fine of R5 000.00 (five thousand rand) or 24 (twenty-four) months imprisonment was also imposed on him.

[2]. On 06 September 2023, Kgoele J caused the review record to be sent back to the presiding Magistrate with some queries. She also directed that the Magistrate should reply to her queries by no later than 15 September 2023, and that should that not be possible, her office should be informed in advance and in writing of the full reasons for the delay. A response from the Magistrate, comprising of one page (excluding the heading and the signature) was dated 12 February 2024. No letter of explanation was availed to the Review Judge prior to this date.

[3]. Following the elevation of Kgoele J to the Supreme Court of Appeal, this matter was later allocated to me. Upon receipt of the file, I immediately asked for an opinion from the office of the Director of Public Prosecutions, Mpumalanga Division (the DPP). I am indebted to the submissions received on 12 July 2024 from the office of the DPP, prepared by Advocates TS Msibi and Z Mata, under the guidance of Advocate N Mpolweni, the Deputy Director of Public Prosecutions. Without their research and the reference to case law and authorities, this judgment would not have been possible.

[4]. The transcribed record forming part of the review bundle reflects that on 08 May 2023, the accused appeared before Acting Magistrate MH Ledwaba before whom he indicated that he wanted to conduct his own defence and that he was pleading guilty to the charge preferred against him. The Magistrate then proceeded to ask him questions in terms of section 112(1)(b) of the Criminal Procedure Act. After explaining various rights to the accused, the following appears from the record of proceedings:

COURT: *It is alleged in the charge sheet that on or about 7 May 2023 and at or near Mayflower, in the district of Chief Albert Luthuli you were arrested?*

ACCUSED: *That is correct.*

COURT: *What were you arrested for?*

ACCUSED: *I was arrested because I was found with dagga.*

COURT: *Can you elaborate on your answer? In other words, with your own words tell the court why you were arrested.*

ACCUSED: *I was found in possession of dagga without a permit, papers, a document permitting me to possess such a substance.*

COURT: *Who arrested you?*

ACCUSED: *The soldiers.*

COURT: *You said you were in possession of dagga?*

ACCUSED: *Yes your worship.*

COURT: *What were you going to do with the dagga in question was in your possession (sic)?*

ACCUSED: *I was taking it to someone. Someone had requested me to bring it to him.*

COURT: *Where was this someone?*

ACCUSED: *In Witbank.*

COURT: *Where did you get the dagga from?*

ACCUSED: *I got it from this other person from Swaziland.*

COURT: *It is alleged that you were dealing in dagga in question, in drugs. What is your answer to that?*

ACCUSED: *I was not dealing in dagga. I was [indistinct].*

COURT: *Is there any other thing you wish to bring to attention of the court?*

ACCUSED: *No, I just want to apologise.*

COURT: *Is that all?*

ACCUSED: *Yes, your worship.*

COURT: *It is said in the charge sheet that the dagga weight was 3.26 kilogram.*

ACCUSED: *I agree your worship.*

COURT: *Was the dagga weighed in your presence?*

ACCUSED: *Yes, your worship.*

COURT: *Anything else Public Prosecutor?*

PROSECUTOR: *None your Worship, in accordance with the State's case, court pleases.*

COURT: *Does the State accept the plea of guilty in this regard?*

PROSECUTOR: *Court pleases your worship… I agree also with the court your worship, is satisfied that the accused admitted …[indistinct] and he is guilty of the offence which he admitted to your worship, also …[indistinct], as the court pleases.*

JUDGMENT

COURT: *After questioning the accused, the court is satisfied that the accused admits all the allegations in the charge, though he does not directly admit that he was dealing in dagga.*

The presumption in the Act, Act 140, 1992 is very clear that the weight of dagga that he was carrying is presumed that he was dealing in dagga.

Accused is found guilty as charged.

[5]. In a query referred to above, the Magistrate was asked to explain how he convicted the accused on his plea, for contravening section 5(b) of the Drugs and Drug Trafficking Act, in circumstances where he vehemently denied that he was dealing in drugs. He was also asked to clarify the section of that Act which he relied on to presume that the accused was dealing in drugs by virtue of the weight of dagga he carried with him; and whether the same was not declared unconstitutional. In essence, he was asked to indicate if the questions asked and the responses given by the accused sufficed for him to be convicted of dealing in drugs.

[6]. To this, the Magistrate responded as follows,

> "1. It is humbly submitted that the accused denied dealing in dagga in contravention of section 5(b) of Act 140 of 1992. I followed section 21(1)(a) of Act 140 of 1992 at the time of my judgment, which I later realized, after the constitutional query of the validity of the section by the Honourable Judge.
>
> (a) Section 21(1)(a) of Act 140 of 1992 of which I unequivocally agree with the Honourable Review Judge it was declared constitutionally invalid. I erred in applying the said section and only realised after the query of the court.
>
> (b) I discovered that I erroneously applied the section that was declared constitutionally invalid after the query of the Review Judge.
>
> (c) It were (sic) not the answers advanced by the accused, but, the presumption of dealing in terms of section 21(1)(a) of Act 140 of 1992, which I now know it was declared constitutionally invalid. At the time of conviction, I was still under the impression that the section was still valid. I shall abide by the decision of the Honourable Review Judge."

[7]. The Magistrate concluded by apologising for only responding on 12 February 2024 instead of 15 September 2023 saying it was because he only received the record with the query on 29 January 2024.

[8]. Office of the DPP also weighed in as indicated above. It suffices for purposes of this judgment that the DPP agrees with the concessions made by the Magistrate to the effect that the presumptions he relied on are unconstitutional. The DPP further requests that the conviction and the sentence be set aside.

[9]. The section that the Magistrate relied on in convicting the accused (section 21(1)(a)(i) of the Drugs and Drug Trafficking Act) provides,

> "[I]f in the prosecution of any person for an offence referred to in section 13 (f) it is proved that the accused was found in possession of dagga exceeding 115 grams; it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance."[1]

[10]. It is indeed settled law for almost three decades now, that the provisions of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act, are unconstitutional. In *S v Bhulwana, S v Gwadiso,*[2] the Constitutional Court had to determine the constitutionality of this section under the 1993 Constitution.[3] In that matter, the section was attacked for imposing a burden of proof on the accused, a so-called "reverse onus" provision, which was contrary to the provisions of section 25(3) of the Constitution.[4] Section 25(3) provided that "every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during a trial."

[11]. In 1994, and in separate trials, both Messrs. Bhulwana and Gwadiso were convicted of dealing in dagga by the Magistrates in different districts of Western Cape. In all these cases, the convictions would not have materialised without the presumptions contained in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act. After expressing doubts on the constitutionality of this section, the High Court sent these cases to the Constitutional Court for determination in accordance with the prevailing provisions of the 1993 Constitution.

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[1] See section 21(1)(a)(i) of the Drugs and Drug Trafficking Act.
[2] [1996] 1 All SA 11 (CC) 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995).
[3] Act 200 of 1993.
[4] Similar provisions are contained in section 35(3) of the current Constitution of the Republic of South Africa (Act 106 of 1996).

[12]. In its judgment dated 29 November 1995, the Constitutional Court declared section 21(1)(a)(i) of the Drugs and Drug Trafficking Act to be inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and was, with effect from the date of this judgment, declared to be invalid and of no force and effect. The Constitutional Court further ordered that this declaration of invalidity invalidated any application of section 21(1)(*a*)(i) of the Drugs and Drug Trafficking Act, in any criminal trial in which the verdict of the trial court was entered after the Constitution came into force, and in which, as at the date of the judgment, either an appeal or review was pending or the time for the noting of an appeal had not yet expired.

[13]. It is as such inconceivable, that 29 years after this section was declared unconstitutional, it would still find application in a South African court, to the extent that an accused is convicted and given a sentence of imprisonment, without a fine, albeit, suspended. This has to be corrected through setting aside the conviction and the sentence. This may however be too little comfort for the accused, who may have suffered substantial injustice at this stage. As indicated above, the accused in this case was also sentenced to a fine with an alternative prison term, of which it remains unknown if he paid the fine or underwent the prison term. In her query to the Magistrate, Kgoele J did ask if the accused paid the fine imposed in this case, but that question was not answered, despite the belated response. The Review Judge must have been mindful of the injustice likely to be suffered by the accused when she gave strict timelines by which the response should have reached her office. Sadly, those timelines were not adhered to.

[14]. Section 303 of the Criminal Procedure Act, which deals with the transmission of record to the High Court for review purposes, provides,

> "303. Transmission of record.
>
> The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302(1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration." [My emphasis].

[15]. It is not clear as to where the record got delayed after it was sent back as the Magistrate indicated that he received it more than four months after it was dispatched from the office of the Review Judge. Investigating the source of the delay at this stage would only serve to delay this judgment, and that is not warranted. In case the accused could not afford a fine, he may have served the sentence already and possibly released on parole by now.

[16]. The one week provided for in section 303 of the Criminal Procedure Act, within which the record should have been dispatched to the High Court for review, is meant to prevent avoidable injustices that may occur such as in this case. It could be that dispatching the record in just one week may prove to be impractical given the lengthy period it takes to get the record transcribed; but a delay such as the one *in casu* is unjustified and inexcusable given the directives ordered by the Review Judge which were ignored. With the advent of technology, requesting and advancing reasons from the trial court should

be possible within 24 or 48 hours, by means of email communication. Sadly, this was not considered here.

[17]. Presenting a case for review after the accused has served the sentence defeats the whole purpose of review. It is the duty of all the officers involved within the Department of Justice and Constitutional Development and Office of the Chief Justice, to give effect to the legislative provision and the court directives meant to protect the accused's rights in a review.[5]

[18]. Failure to give heed to the directives given by the Review Judge in this case, needs to be investigated in order to identify the source of delay so as to avoid a repeat in the future. For this reason, this judgment should be brought to the attention of the Court Managers for the High Court, Mbombela and for the Chief Albert Luthuli District. The Court Managers should compile report(s) to be filed with the Chief Registrar of this court within 30 days of this judgment, in which they identify the source of delay after the record was dispatched by the Review Judge, and also indicate the remedial steps taken to avoid similar delays in the future. The judgment should also be brought to the attention of the Chief Magistrate of Mpumalanga to help identify areas in need of training and refresher courses for the benefit of the Magistrates and to avoid a recurrence of errors such as what happened in this case.

[19]. For the reasons given above, the following order is made.

19.1 The conviction and the sentence are set aside.

19.2 The Chief Registrar is directed to avail this judgment to the Court Managers for Mbombela High Court and Chief Albert Luthuli District,

[5] See *S v Nyumbeka* 2012 (2) SACR 367 (WCC) and *S v Jacobs and six other similar matters* 2017 (2) SACR 546 (WCC).

and to the Chief Magistrate of Mpumalanga to act in accordance with paragraph 18 above.

[redacted]
TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA

I agree

[redacted]
N MAZIBUKO
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA

16 SEPTEMBER 2024