COMMENTS

Dealing in drugs revisited: *S v Mbatha* 2012 (2) SACR 551 (KZP)

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1. Introduction

The Drugs and Drug Trafficking Act 140 of 1992 (hereinafter the 'Act') makes provision for the essential crimes pertaining to drugs. The two most important crimes provided for in the Act are dealing in drugs and the use or possession of drugs (see sections 4 and 5 of the Act; CR Snyman *Criminal Law* (2008) 5ed 428-435; J Burchell *Principles of Criminal Law* (2006) 3ed 908-917). The Act divides drugs into three general categories which are: dependence producing substances; dangerous dependence producing substances; and undesirable dependence producing substances and the specific drugs resorting into each of these categories are listed in Schedule 2 of the Act (Snyman op cit 429). Dealing in drugs is the more serious offence of the two offences concomitantly carrying harsher sentences or penalties (see section 17(*c*) and (*e*) of the Act read with sections 13(*e*) and (*f*); *S v Cwele and Another* 2013 (1) SACR 478 (SCA); *S v Gcoba* 2011 (2) SACR 231 (KZP); *S v Naidoo* 2010 (1) SACR 369 (KZP); *S v Mtolo* 2009 (1) SACR 443 (O); *S v Mlambo* 2007 (1) SACR 664 (W); *S v Tshabalala* 2007 (2) SACR 263 (W); Snyman op cit 431). The Act defines 'deal in' in relation to a drug as 'performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug'. The case under discussion is of particular relevance as the precise meaning ascribed to term *cultivation* for purposes of establishing the offence of dealing in drugs was in dispute. The case under discussion, in addition, reflects upon the definitional element of intention required for purposes of the offence of dealing in drugs. The decision is further topical as if, *inter alia*, reflects upon the principle of strict liability and addresses constitutional concerns relating to the proof of the offence of dealing in drugs. The decision further opens the door to critical debate pertaining to the issue of an accused's right to remain silent and the possible negative impact thereof.

2. Facts

The salient facts appear from the judgment delivered by Gyanda J and can be summarised as follows: On 4 January 2011 the South African Police Services proceeded to the home of the accused as a result of information received. Whilst searching the premises of the accused, the police found a parcel of loose dagga in a clear plastic wrapping alongside the bed. On proceeding with their search outside the premises alongside the house, a clear-plastic bread packet containing dagga seeds was found. In addition, they also found a newspaper bundle containing loose dagga. On further searching the yard of the premises they found a fully grown dagga tree.

It was clear that the tree had been taken care of. The accused was subsequently taken with the dagga to a pharmacy where the dagga was weighed and thereafter to the offices of the South African Police Services at Dundee where the dagga was handed in as evidence and recorded in the SAP13 register.

The accused was subsequently charged in the magistrate's court of the district of Dundee of dealing in dagga in contravention of the provisions of section 5(*b*) of the Act read with sections 1, 13(*f*), 17(*e*), 18, 19, 25 and 64 and in the alternative with possession or use of dagga in contravention with sections 1, 13(*d*), 17(*d*), 18, 19, 25 and 64 of the Act. The trial magistrate convicted the accused of dealing in dagga and sentenced the accused to eighteen months imprisonment, wholly suspended for a period of three years on condition that he was not again convicted of contravening sections 5(*b*) or 4(*b*) of the Act committed during the period of suspension. The accused was, in addition ordered to pay a fine of R1 000-00 or in default thereof undergo six months' imprisonment. The case was referred on automatic review to Wallis J who referred the matter for argument before the full court in relation to the precise meaning of the word 'cultivation' contained in definition of 'deal in' in the Act. The evidence led by the state was not challenged by the accused and as such the accused elected to remain silent and expressly indicated that he wished to leave everything to the court (see para [5]).

3. The majority judgment

With reference to the interpretation of the term 'cultivation', the majority of the court (at para [8]) relied primarily on the *dictum* of Cillié JP and Bekker J in the decision of *S v Kgupane en Andere* 1975 (2) SA 73 (T) at 75H where the term 'cultivate' was assessed in terms of the forerunner to the Act, namely the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 and Bekker J stated as follows:

> 'Na my mening geld die volgende: Dat 'n kweker van dagga skuldig is aan "handeldryf" is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van "handeldryf" wat verskyn in art 1 van die Wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak moet word uit hoofde van omskrywing van "handeldryf", gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem wees. Met ander woorde, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir watter doel dit ook al bestem is. Natuurlik is dit terselfdertyd dan ook so dat die kweker "in besit" van die daggaplant is en dat 'n pas ontkiemde plant minder as 115 gram kan weeg. Dit egter, gesien in die lig van die omskrywing van "handeldryf" bied hom geen uitkoms nie. Die klem val nie op die word "besit" nie maar op "kweek" van dagga, wat hom dan binne die trefwydte van handeldryf insleep.' (see also *S v Guess* 1976 (4) SA 715 (A)).

In applying the *dictum* in the *Kgupane* decision *supra*, the majority of the court per Gyanda J held (at para [12]):

> 'I am of the view therefore, that, in spite of the sympathy that may be felt for a user of dagga, who plants a single dagga plant for his own use, but is convicted of dealing in dagga rather than possession thereof, … it is quite clear that the intention of the legislature was that, in its pursuit of the sharks, unfortunately some minnows might be caught in the same net'

The court rejected the argument that 'cultivate' should be interpreted within the context of 'raising' or 'growing' plants for commercial purposes and as such not bringing within the ambit of 'cultivate' a user who grew a solitary pant for his or her own use (at para [14]). A person falling in the latter category would as such not be deemed a 'dealer'. It was held that such circumstances would at most be relevant for purposes of assessing the question of sentences to be imposed (at para [14]). It was accordingly held that the court could not assist the ordinary user of dagga who cultivates a dagga plant for his or her own personal use in terms of not cultivating it for the purpose of dealing but for own personal use and/or possession (at para [15]). It was held that the accused had correctly been convicted of dealing in dagga (at para [16]).

4. The minority judgment

The minority judgment delivered by Madondo J took a different stance on the question as to whether the 'cultivation' of a single plant or even a few dagga plants per se constituted 'dealing' in dagga in terms of the provisions of the Act. It was noted that there was no evidence indicating that the accused was dealing in dagga and the accused, in addition, never admitted to dealing in dagga (at 559*i-j*). The accused could also not be presumed to have been dealing in dagga in terms of

section 21(1)(*a*) of the Act since such presumption had been declared unconstitutional (at 559*j*-560*a*).

It was held that nothing in the charge sheet indicated that the accused cultivated the dagga plant and that by such cultivation he in fact dealt in dagga. As such it was incumbent upon the state to prove beyond reasonable doubt that the accused cultivated the dagga plain in question (at 560*b*-*d*). It was held that by affording the word 'cultivate' a liberal interpretation in order to constitute dealing in dagga without reference to *mens rea*, presupposes strict liability in respect of the offence (at 561*b*). With reference to the *Kgupane* decision, the minority held that if the approach adopted in the said decision is to be followed, it would result in a conviction of dealing in dagga upon mere proof of the prohibited act – the 'cultivation' of dagga, without proof of the *intention* to do so (at 561*f*-*g*). It was held that it had not been the intention of the legislature to impose strict liability for the offence of cultivation of dagga (at 562*j*). The court, in addition referred to the judgment in *S v Arenstein* 1964 (1) SA 361 (A) at 365C where it was pertinently stated that in construing statutory prohibitions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof punishable. Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, nature and extent of the penalty and the ease with which the prohibition could be evaded if reliance could be placed on the absence of *mens rea* (at 563*a*-*b*).

It was held that the object of the Act was, *inter alia*, to provide for the prohibition of the use or possession of, or dealing in drugs as well as acts relating to the manufacture or supply of certain substances or the acquisition or conversion of the proceeds of certain crimes, the recovery of the proceeds of drug trafficking and matters connected thereto (at 563*f*-*g*).

Madondo J, in addition, held as follows (at 563*g*-*h*):

> 'It is apparent … that the Act aims at eliminating financial incentives from illicit trafficking in dagga, but not to brand any act relating to dagga-handling as dealing. Therefore it is appropriate to conclude that the word "cultivation" should not be interpreted in isolation, but with reference to dealing in dagga. For an accused person to be convicted of dealing in dagga, merely on the basis that he or she has cultivated dagga, a link must be established between cultivation of and dealing in dagga. In other words, the evidence must show beyond a reasonable doubt that the accused person cultivated dagga for the purpose of selling or supplying it to other people. In fact, the state must prove cultivation, prohibition, ie dealing in dagga and intention.'

It was held by Madondo J that the intention of the legislature in prohibiting cultivation of dagga was to prevent *sale* or *supply* of it and as such the provisions relating to 'deal in' should not be construed in

such a way as to render a person possessing dagga for personal use, or therapeutic purposes, a dealer (at 564*e*).

From a constitutional perspective, Madondo J touched upon various constitutional aspects pertaining to the interpretation of the Act. It was held that the principle of strict liability impacts negatively on the right to a fair trial provided for in section 35(3) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'Constitution') (at 566*g*). In respect of the presumption of innocence enshrined in section 35(3)(*h*) of the Constitution, Madondo J held (at 567*c-d*):

> 'The presumption of innocence includes both the right of an accused to be presumed innocent until proved guilty, and the right to have the state bear the burden of proving guilt beyond reasonable doubt. The interpretation which allows the court to convict an accused person of dealing in dagga on the mere proof of dagga cultivation, without proof of mens rea, places an onus on the accused to establish his innocence on a balance of probabilities in order to escape conviction. It does not exclude the possibility of the accused being innocent. The real concern is not whether the accused must prove an element or prove an excuse, but that an accused may be convicted while reasonable doubt exists … . It is also in conflict with the long established rule of common-law on burden of proof, that the prosecution must prove the guilt of the accused person beyond reasonable doubt.'

An important aspect to which Madondo J alluded to in the minority decision relates to the penalties prescribed in the Act in respect of the offence of dealing in drugs. Section 17(*e*) of the Act provides that any person of the offence of dealing dagga shall be liable to imprisonment for a period not exceeding twenty five years or to both imprisonment and such fine as a court may deem fit (see also Snyman op cit 434). It was held that the imposition of minimum imprisonment for an offence which may be committed unknowingly and without the requisite intention depriving the accused person of his or her liberty and 'offends against the principles of fundamental justice' (at 568*g-h*). Madondo J alluded to the loss of liberty by an accused person convicted of dealing in dagga without sufficient proof of the essential element of faulty by stating (at 569*b-c*):

> 'Attachment of a mandatory imprisonment sanction to an absolute liability offence interferes with the provisions of s 12(1)(*a*) of the Constitution providing the right not to be deprived of freedom arbitrarily and without just cause, in that an accused person convicted for cultivating dagga automatically loses his or her liability.'

It was held that there is no indication that the interpretive approach ascribed to the meaning of the word 'cultivation', which inherently infringes on the right to be presumed innocent and the right to freedom and security of the person, constituted a legitimate limitation of the rights nor that such infringement serves a legitimate purpose

(at 570*a-b*). It was further held that there is no evidence to indicate that the cultivation of a single dagga plant or a few plants presents a reasonable risk of serious, substantial or significant harm to either the individual concerned or society (at 570*c-e*). As such an accused person who grows a single dagga plant or few plants for own use, may face severe punishment and can potentially be exposed to the full extent of the confiscation provisions. In terms of section 25 of the Act such an accused person stands to lose his or her assets, including homes as in terms of section 25 of the Act provides that a conviction of dealing in dagga may be followed by an order for confiscation of assets (at 570). In terms of section 25 of the Act, a court convicting an accused person of dealing in drugs, may, in addition to any punishment which the court may impose, declare any property, including the immovable property used for the purpose of or in connection with the commission of the offence, to be forfeited to the state (at 570*i-j*). It was held that the legislature had not intended to exclude *mens rea* as an essential ingredient of the offence of dealing in drugs by including the word 'cultivation' in the definition of 'deal in' in the Act (at 572*a-b*). It was further held that where a statutory provision imposes an obligation upon an accused person to establish certain facts in order to escape criminal liability, it constitutes a breach of the presumption of innocence enshrined in section 35(3)(*h*) of the Constitution (at 572*f-g*). In respect of the interpretation of the term 'cultivation' Madondo J held (at 573*c-d*):

> 'The word "cultivation" should be interpreted restrictively to mean cultivation for commercial purposes or to supply to other people. In order to secure a conviction of dealing, on the ground of dagga cultivation, the state must prove beyond reasonable doubt cultivation, dealing and the mens rea to commit such an offence on the part of the accused. In other words, a connection between cultivation of and dealing in dagga must be proved beyond all reasonable doubt.'

Madondo J, in addition, held that a distinction should be drawn between more and less serious cases of cultivation of dagga. The less serious instances involving a single or small number of plants retained for personal use should be prosecuted in terms of section 4*(b)* as unlawful possession. The more serious instances with specific reference to large scale commercial growing, from which it could reasonably be inferred that the accused is dealing in dagga, and where upon conviction the imposition of severe sentences and the consequent confiscation of the proceeds might be appropriate, should continue to be prosecuted in terms of section 5(*b*) as dealing in dagga (at 573*e-f*). Madondo J accordingly held that 'an accused person may be charged with cultivation of and hence dealing in dagga if the evidence sufficiently established that a particular accused has cultivated dagga

for commercial purposes or dealt in dagga though on a small scale' (at 573*f*). The minority of the court held that the appeal against conviction should succeed and that the conviction of dealing in dagga should be set aside and substituted with a conviction for possession of dagga (at 573*g*).

5. Assessment

The decision under discussion has relevance both from a substantive criminal law perspective as well as from a procedural perspective. The purpose of the Act is clearly enunciated in the preamble where it is stated that the Act is intended 'to provide for the prohibition of the use or possession of, or the dealing in, drugs and of certain acts relating to manufacture of certain substances'. The Act extends the definition of 'deal in' to also provide for the 'cultivation' of a drug which is a broader definition than its predecessor contained in the forerunner of the Act. From a purely substantive criminal law perspective the fact, however, remains that one of the elements for establishing the offence of dealing in drugs, is intention (Snyman op cit 433; *S v Job* 1976 (1) SA 207 (NC); *S v Ngwenya* 1979 (2) SA 96 (A); *S v Hlomza* 1983 (4) SA 142 (E); *S v Jacobs* 1989 (1) SA 652 (A) at 656B; Burchell op cit 912-915). It is particularly in relation to the substantial proof of the offence of dealing in drugs with specific reference to the element of fault where the decision under discussion becomes relevant. It is trite that dagga falls within the category of undesirable dependence producing substance under Schedule 2 of the Act and thus classifies under the most serious substances. There is no indication that the legislator intended strict liability to be applied in cases of dealing in drugs thus placing the burden on the prosecution to prove beyond reasonable doubt all the elements of the offence, and more specifically intention. Presumed dealing can, in addition, no longer assist the prosecution in terms of proving the offence of dealing in drugs as the presumptions contained in section 21 of the Act were declared unconstitutional (see specifically *S v Zuma and Others* 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401) at para [33]; *S v Bhulwana; S v Gwadiso* 1995 (2) SACR 748 (CC) (1996 (1) SA 388; 1995 [12] BCLR 1579; (1996) 1 All SA 11) at para [15]; *S v Mbatha; S v Prinsloo* 1996 (1) SACR 371 (CC) (1996 (2) SA 464; 1996 (3) BCLR 293) at para [12]; *S v Julies* 1996 (2) SACR 108 (CC) (1996 (4) SA 313; 1996 (7) BCLR 899) at para [3]; *S v Ntsele* 1997 (2) SACR 740 (CC); *S v Mjezu* 1996 (2) SACR 594 (NC); Snyman op cit 432; Burchell op cit 914).

It could be argued that the majority decision applied a very liberal interpretation of the term 'cultivation' by relying almost exclusively on the *dictum* in the *Kgupane* decision which is, in addition, a decision

dating from the seventies. It could further be argued that by holding the accused criminally liable for the offence of dealing without proving that he had the requisite intention to deal, or without the necessary *nexus* between the possession of the dagga plant and the cultivation of and dealing in it, the court is in fact applying the unconstitutional presumptions in an indirect manner. By the mere act of possessing the dagga plant, the court is drawing the inference of also 'cultivating' in order to establish that the accused 'dealt' in dagga. As such the accused is held to have 'dealt' in dagga without any evidence that he indeed had the required intention to 'deal' in dagga.

A decision of interest is *S v Van der Merwe* 1974 (4) SA 310 (E) where the appellant had been convicted in the court *a quo* of dealing in dagga due to the fact that he had watered and nurtured a small dagga plant which he kept in a small tin in his room. The court consequently allowed the appeal and held:

> 'The legislation of this nature, with its far reaching criminal consequences, had to be given a restrictive interpretation and that the definition of dealing in dagga should not be given a wider interpretation than was necessary to achieve the obvious intention of the legislature …'

The conviction of dealing was accordingly substituted with one of possession of dagga. In terms of the majority decision, in the case under discussion, the inference could easily be drawn that the court applied the principle of strict liability. As stated above and also alluded to in the minority judgment, there exists no indication in the Act indicative thereof that the legislator intended to dispense with the requirement of culpability. There is, in addition, also the general presumption that the legislator did not intend to create strict liability, unless there are clear and convincing indications to the contrary (Snyman op cit 247; *S v De Blom* 1977 (3) SA 513 (A) at 532). The latter indications can be derived from language and context of a provision; the scope and object of a provision; nature and extent of punishment; the ease with which a provision may be evaded if culpability were required and the reasonableness of declaring that culpability is not required (Snyman op cit 247; see also *S v Coetzee* 1997 (1) SACR 379 (CC) at 442*h-i* where O'Regan J noted that strict liability may be unconstitutional and held 'as a general rule people who are not at fault should not be deprived of their freedom by the state … Deprivation of liberty, without established culpability is a breach of this established rule.').

It is notable to also refer to the recent judgment of *Vetter v S* (2013) JOL 30370 (KZP) where the appellant was convicted on two counts of dealing in drugs and was sentenced to four years' imprisonment. The facts revealed that the appellant had buried drugs on the instruction of his brother which the police later found. In convicting the appellant the trial court relied on the large quantity of drugs found. On appeal

the court was satisfied that the state had fully established the elements for possession of drugs and consequently substituted the conviction of dealing in drugs with possession of drugs. In delivering judgment Mbatha J held (at para [8]):

> 'A dealing charge can be proved in a number of ways. In this case the court relied on the basis that the Appellant was found in possession of a huge amount of drugs and it drew an inference that the Appellant was dealing in drugs. Constitutionally it is no longer acceptable to rely on presumptions, like quantity, alone to prove intent to deal. Certain other factors indicating the intent to deal must be present to draw an inference that there is an intention to deal in drugs, for instance, presence in an area known for drug dealing, possession of weighing gadget, approaching persons to sell drugs or the actual sale of drugs.'

From a procedural perspective, the decision under discussion also opens the door for debate pertaining an accused's failure to testify viewed against the constitutional right of an accused to refuse to testify. The question which comes to fore is how such refusal, as was evident in the decision under discussion, impacts upon the assessment of criminal liability and guilt of the accused. The issue of the accused's failure to testify was not pertinently addressed by the majority or the minority judgment but nevertheless calls for discussion.

It is trite that an accused can, in the absence of a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (hereinafter 'CPA') elect to refrain from testifying or calling any defence witnesses (see PJ Schwikkard and SE van der Merwe *Principles of Evidence* 3rd ed (2012) 433).

It then becomes incumbent upon a Court to explain to the accused the prejudicial impact of exercising the constitutional right to refuse to testify and that as a result of such refusal the prosecution's *prima facie* case will be left uncontested (Schwikkard and Van der Merwe op cit 433). In the absence of any account provided by the accused, a court will adjudicate such case based on the prosecution's evidence (see *S v Brown* 1996 (2) SACR 49 (NC) at 65*f*). Despite the fact that no adverse inference can be drawn against an accused based on his or her failure to testify, it remains a reality that in doing so, the court is left with the uncontested *prima facie* case of the prosecution. Although the accused's failure to testify bears no probative value and cannot cure defects in the prosecution's case, the prosecution's case may be such that the consequence of the accused's silence is that there simply exists no reasonable doubt in the mind of the Court and that the prosecution's *prima facie* case 'hardens' into a case beyond reasonable doubt (See *R v Sole* 2004 (2) SACR 599 (LesHC) at 684*f-g*; Schwikkard and Van der Merwe op cit 544; *S v Brown* op cit at 61*b-i*). As such the issue then revolves around sufficiency and weight of evidence. In *S v*

Boesak 2001 (1) SACR 1 (CC) the Constitutional Court encapsulated the dilemma by stating (at para [24]):

> 'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such conclusion is justified will depend on the weight of the evidence.'

Reflecting upon the case under discussion, it could be argued that the accused's conviction on dealing in drugs could also have been justified in the wake of the accused's failure to testify. The accused presented no evidence to challenge the prosecution's *prima facie* case. Given the gravity of the offence, some explanation by the accused in support of his denial of guilt could have proved of significance also with specific reference to the well-tended dagga tree. From a substantive criminal law perspective, the prosecution has the burden of proving beyond reasonable doubt all the elements of the offence of dealing in drugs which includes the intention to deal in drugs. It is conceivable from the majority judgment that little attention was paid to the essential element of intention required to establish the offence of dealing in drugs. As such, it is submitted, a conviction could rather have followed from the fact that the prosecution's *prima facie* case, which was left uncontradicted, was simply too weighty to result in a conviction on a lesser charge of possession of drugs. It is submitted that the latter would have been procedurally sound whilst still according due cognisance to the essential substantive elements in order to establish the offence of dealing in drugs (see also Schwikkard and Van der Merwe op cit 545; *S v Makhubo* 1990 (2) SACR 320 (O) where it was held that a failure by an accused to give evidence is a factor which should be assessed with other factors to render an inference of guilt).

Given the gravity of a charge of dealing in dagga coupled with the harsh penalties prescribed in the Act, it is submitted that culpability in the form of intention remains an essential element for proving the offence of dealing in dagga. From a constitutional perspective the minority judgment in dealing with the essential elements of the offence seems more in line with well-established constitutional values and norms. It is submitted that in any case of cultivation of dagga, whether it be a small amount or even a single plant to a larger scale, the prosecution still needs to prove intention on behalf of the accused and more specifically intention to cultivate for commercial purposes or for purposes of selling it or for some commercial activity in connection therewith. It will obviously be easier to prove that the accused was dealing in dagga where large scale commercial growing is concerned

as opposed to situations as found in the case under discussion where only one plant was concerned.

Each case will have to be assessed in terms of its own factual circumstances. It is submitted from a procedural perspective that when an accused person is charged with dealing in dagga, an alternative charge of possession of or use of dagga in terms of section 4(*b*) of the Act should also be provided for. Should the evidence before the court consequently fail to establish that the accused had the requisite intention to cultivate for commercial purposes and concomitantly to 'deal in' dagga, the accused could still in the alternative be convicted of ordinary use or possession of dagga in terms of section 4(*b*) of the Act.