

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: A 746/2006

In the matter between:
HUSSEIN, NDIKUMANA

Appellant

and

THE STATE

Respondent

JUDGMENT

GOLDSTEIN J:

- [1] The appellant was convicted of dealing in dagga in a Magistrate's Court in Johannesburg on 11 May 2005, and sentenced to 5 years' imprisonment. On 25 May 2005 he signed a notice of appeal against his sentence. Significantly he stated in the notice, *inter alia*, that "only 40 grams" were involved, that he was an "addict", and that he "was not selling to any one", and that, in his words, "it was for my personal use". He was granted leave to appeal against his sentence by the learned Magistrate, Mr V Pienaar, on 20 July 2005, having abandoned his application for bail pending the

appeal.

- [2] The appellant now asks us to grant him leave to appeal against his conviction. He has not so far applied for such leave before the Court *a quo*, but he recently attempted to obtain such leave. In his affidavit in support of his request for leave from this Court he says, *inter alia*, the following:

“4.

On 15 May 2005, the Magistrate Mr Pienaar sitting in Johannesburg Court 6 convicted me of dealing in 40 grams of dagga and sentenced me to 5 years imprisonment.

5.

I thereafter applied for leave to appeal in respect of sentence only, which was granted on 20 July 2005.

6.

The appeal against sentence has been set down for 16 April 2007.

7.

In the course of perusing the record for the purposes of preparing the heads of argument, my Counsel was not satisfied with the conviction and deemed it necessary to apply for leave to appeal also in respect of conviction.

8.

An application for leave to appeal was filed on 13 March 2007. The application for leave to appeal was set down for Tuesday 20 March 2007. A copy of the application is annexed hereto marked “A”.

9.

The prosecutor refused to place the matter on the roll on 20 March 2007 because:

- 9.1 despite the fact that I was requisitioned to appear, the prison authorities at Leeuwkop Prison failed to bring me to Court. The Magistrate and Prosecutor both stated that the application would not be heard in my absence. This is in spite of the fact that a special power of attorney had already been signed by me. I am advised that in the circumstances my presence at Court was not required
- 9.2 The Magistrate further stated that he refused to hear the matter because the appeal file was not brought to him. I am advised that the entire appeal file had already been transferred to the High Court.

10.

In the result, my application for leave to appeal against the conviction was not heard. My Counsel gained the impression that the Magistrate and Prosecutor were both working together with a common purpose to frustrate the hearing of the application for leave to appeal against conviction. My attempt to exercise my constitutionally guaranteed rights was met with a brick wall.

11.

On the same day my Counsel caused me to be requisitioned again for Monday 26 March 2007. This requisition was delivered, personally to Mr Fouche at Leeuwkop Prison at 12h55 on 20 March 2007. A copy is annexed hereto and marked "B". It will be noted that this annexure contains a date stamp from the prison as well as the details of Mr Fouche.¹

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In addition, and to further ensure that the matter would proceed on 26 March 2007, my Counsel also arranged with the Clerk of Court dealing with appeal matters that the appeal file would be collected from the High Court in order that it would be available on 26 March 2007. This arrangement was made already on 22 March 2007. An undertaking was

¹ The note appended to the name "Fouche" reads:
 "(011) 208 9507 (Records) Time 12:55 p.m."

given to my Counsel that this would be done.

13.

In addition on 22 March 2007, my Counsel also arranged with the office of the Chief Interpreter at the Johannesburg Magistrate Court that a Swahili interpreter would be available in Court 6 on 26 March 2007. Again an undertaking was given to my Counsel that this would be arranged.

14.

On the morning of 26 March 2007, my Counsel found to his surprise that despite all the arrangements which he had timeously made the previous week:-

4.1 I was not brought from prison;

14.2 The appeal file was not at Court and had not been collected by the appeals Clerk from the High Court; and

14.3 There was no Swahili Interpreter in Court.

15.

In the circumstances, the prosecutor again refused to place my application on the roll.

16.

My Counsel again gained the impression that he was being actively frustrated in bringing an application for Leave to appeal before the Court in circumstances in which the application had merit. Again my attempts to exercise my constitutionally guaranteed rights were met with a brick wall.

17.

In view of his experience on two occasions, my Counsel believed that it would serve no purpose to again try to place my matter on the roll as he would no doubt again be frustrated from so doing. These attempts would no doubt again be met with the same deliberate lack of co-operation. I verify believe that there is a system in place at the Johannesburg Magistrate's Court aimed at preventing my application being placed on the roll lest it be granted.

18.

I am advised that it will be argued at the hearing of this matter that the refusal to place my application on the roll is the equivalent of it being dismissed, thus necessitating a petition.

19.

My application for leave to appeal has excellent prospects of success.....”

[3] The application for condonation for the late bringing of the application for leave to appeal against conviction is attached as annexure “A” to the application before us. It is supported by an affidavit made by Shereen Jane Nicholson who describes herself as an administrative assistant at the Johannesburg Justice Centre, which I understand, is a Legal Aid Office. She says the following in respect of the appeal before us:

- “6. The matter was allocated to advocate Miller of our office. Upon perusing the record, advocate Miller formed the view that the conviction of dealing in dagga was not in order and should therefore be set aside, and substantial (sic) with a conviction of possession of dagga. This gave rise to the present application.
7. This was something which could not be known by the Appellant who is a layman and also a foreigner in a country where he is unfamiliar with the legal system and also with the language.
8. Although the Appellant enjoyed legal representation at the time of the application for leave to appeal, his legal representative was a candidate attorney who at that time had little experience.
9. I say that the application for leave to appeal has good prospects of success more particularly as the conviction of dealing in dagga cannot be sustained. It is in the interests of

justice that leave to appeal be granted against the conviction.”

[4] Clearly the appeal has good prospects of success, and counsel for the State very properly concedes that the appellant ought only to have been convicted of possession. The facts can be briefly stated. The appellant informed the trial court that he was a Rastafarian who smoked dagga daily. He had rolled 30 dagga cigarettes that day, smoked 6 and was found by the police with the remaining 24. They were for his own use. The State called a single police witness who testified that the appellant was searched by his colleague, and that he (the witness) saw a “blue plastic containing that 24 wrapped pieces of dagga”, but no money. He also did not see the appellant selling dagga to anyone. Clearly the State failed to prove that the appellant dealt in the dagga.

[5] It seems to me that the appellant is correct in contending that the obstructionism his counsel encountered in having his application for leave to appeal against conviction heard amounted to a refusal of such leave, entitling us to grant leave. If the learned Magistrate was in fact obstructive of the application for leave to appeal being heard that would be a most serious dereliction of his duty. All judicial officers, judges and magistrates, are duty bound to dispose promptly and helpfully with applications for leave to appeal, and obstructionism in this regard calls for the most

serious censure. Prosecutors and prison authorities have a duty too to expedite such applications, and obstructionism on their part also calls for serious censure. This is obviously so in respect of all litigants, but especially where litigants are indigent and vulnerable as this appellant is; moreover, he is a foreigner and a prisoner who probably has few if any support systems in South Africa, and he is a recipient of legal aid, all of which makes the callous treatment of him all the more unacceptable and reprehensible.

[6] Even if I am wrong in regarding what has happened as a refusal of leave, we would have intervened in this case to set aside the conviction, in the exercise of our review jurisdiction, which, of course, is designed to enable us to do justice regardless of technicalities.

[7] Counsel for the appellant and the Johannesburg Justice Centre are to be commended for their diligence in this matter.

[8] Unfortunately the appellant has now been serving his sentence for nearly 2 years, and before that he spent about 6 months in prison awaiting trial, whilst he should have been kept out of prison entirely, and possibly have received only a suspended sentence. In the light of what has occurred I think a proper sentence a fine of R1000 or 6 months' imprisonment. When

we heard the appeal on 16 April 2007 we caused a telegram to be sent for the immediate release of the appellant, if he was in custody only in respect of the matter with which we are concerned.

[9] The following order is made:

1. The appellant is granted leave to appeal against conviction.

2.1 The appeal against conviction succeeds.

2.2 The conviction of dealing in dagga is altered to read:

“Convicted of the possession of 40 grams of dagga.”

3.1 The appeal against sentence succeeds.

3.2 The sentence is altered to read:

“The accused is fined R1000 or 6 months’ imprisonment”

3.3 The period of 6 months’ imprisonment is ante-dated to 11 May 2005 in terms of the provisions of section 282 of Act 51 of 1977.

4. The Registrar is requested to send a copy of the judgment in this matter to:

4.1 The Minister of Justice and Constitutional Development;

4.2 The Minister of Correctional Services;

4.3 The Head of the Magistrates’ Commission;

4.4 The Head of Leeuwkop Prison;

4.5 The Chief Magistrate, Johannesburg;

4.6 The Chief / Senior Prosecutor, Johannesburg Magistrate’s Court;

for them to consider the conduct of the Magistrate, Prosecutor, and prison authorities at Leeuwkop, as well as the alleged practice at the Johannesburg Magistrate’s Court, allegedly calculated to obstruct applications for leave to appeal.

JUDGE OF THE HIGH COURT

I agree

P A HATTINGH

ACTING JUDGE OF THE HIGH COURT

For the appellant:	M F Miller, Johannesburg Justice Centre
For the respondent:	M Mophatlane
Dates of appeal:	16 April 2007
Date of Judgment:	20 April 2007