

THE INFLUENCE OF GOVERNMENT POLICY ON SENTENCES IN MAGISTRATES' COURTS:  
AS REFLECTED IN SENTENCES RELATING TO CERTAIN SECTIONS OF THE IMMORALITY  
ACT 23 OF 1957, DEALING IN AND POSSESSION OF DAGGA IN CONTRAVENTION OF  
THE ABUSE OF DEPENDENCE-PRODUCING SUBSTANCES AND REHABILITATION CENTRES  
ACT 41 OF 1971 AND THE STOCK THEFT ACT 57 OF 1959

A DLODLO

(ii)

THE INFLUENCE OF GOVERNMENT POLICY ON SENTENCES IN MAGISTRATES' COURTS:  
AS REFLECTED IN SENTENCES RELATING TO CERTAIN SECTIONS OF THE IMMORALITY  
ACT 23 OF 1957, DEALING IN AND POSSESSION OF DAGGA IN CONTRAVENTION  
OF THE ABUSE OF DEPENDENCE-PRODUCING SUBSTANCES AND REHABILITATION CENTRES  
ACT 41 OF 1971 AND THE STOCK THEFT ACT 57 OF 1959

by

ANDREAS DLODLO

B IURIS (SA) LL B (UZ)

SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF LAWS IN THE FACULTY OF LAW,  
UNIVERSITY OF NATAL, DURBAN

MARCH 1987

SUPERVISOR: PROF E NEWMAN Q C

"The policy and intention of the Act has been the subject of considerable public debates. With criticisms of that policy the courts are not concerned that their duty is to give effect to the provisions of the Act. At the same time, however, they must, insofar as they are able to do so within the limits prescribed by the Legislature, impose punishment on persons convicted of contraventions under the Act which are just."

per Marais et al; J J in Nkosi and Others 1972 2 SA 753 at 755B.

"At all events, I do not think that we should go on complacently talking about an independent judiciary in South Africa when we are really speaking only about one section of it. I do not overlook the fact that shortcomings on the magisterial bench are subject to correction by the Supreme Court. But, for various reasons, including the poverty and ignorance of many accused persons, the majority of magistrates' courts decisions are not effectively subject to appeal or review."

Sydney Kentridge SC 'Telling the truth about law' (1982) 99 SALJ 648 at 654-5.

PREFACE

I wish to record my gratitude to my Supervisor, Prof Newman Q C, for his guidance and suggestions which have contributed to the completion of this work. I am also particularly grateful to Dr J C Bekker and my other colleagues, to members of my family, for their encouragement and assistance, to The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund and to the University of Zululand for their financial assistance and to the Magistrate of the Lower Umfolozi (Empangeni) District Court and his staff for allowing me to peruse their court records and for their assistance.

I record, finally, that the whole thesis, unless specifically indicated to the contrary in the text, is my own original work.

A DLODLO

KWADLANGEZWA

MARCH 1987

CONTENTS

FULL TITLE .....	ii
PREFACE .....	iv
CHAPTER ONE : INTRODUCTION .....	1
1.    PRELIMINARY NOTE .....	1
2.    THE INDEPENDENCE OF MAGISTRATES .....	3
3.    POLICY, PRINCIPLE AND DISCRETION .....	16
CHAPTER TWO: SENTENCES IMPOSED FOR CONTRAVENING THE IMMORALITY ACT, 23 OF 1957 .....	
1.    INTRODUCTION .....	22
2.    SECTION 16: SEXUAL OFFENCES BETWEEN WHITES AND COLOUREDS .....	22
3.    SECTION 14: SEXUAL OFFENCES WITH GIRLS UNDER 16 YEARS OF AGE AND BOYS UNDER 19 YEARS OF AGE .....	39
4.    SECTION 2: KEEPING A BROTHEL .....	43
CHAPTER THREE: THE ABUSE OF DEPENDENCE - PRODUCING SUBSTANCES AND REHABILITATION CENTRES ACT, 41 OF 1971 .....	50
1.    INTRODUCTION .....	50
2.    PENAL PROVISIONS .....	51
3.    POLICY .....	54
4.    SOME OTHER VIEWS ON HOW DAGGA AFFECTS ITS USERS .....	55
5.    GUIDELINES EXTRACTED FROM LEADING CASES .....	57
6.    SENTENCES .....	67
6.1 Dealing in dagga .....	67

6.2	Statistics .....	85
6.3	Being in Possession of Dagga.....	90
6.4	Statistics .....	107
6.5	Conclusion .....	111
CHAPTER FOUR : THEFT OF STOCK .....		114
1.	INTRODUCTION .....	114
2.	POLICY .....	114
3.	CASES .....	118
4.	STATISTICS .....	133
5.	CONCLUSION .....	135
CHAPTER FIVE : CONCLUSION .....		137
1.	FINDINGS .....	137
2.	RECOMMENDATIONS .....	142
3.	AUTHOR'S VIEWS .....	146
BIBLIOGRAPHY .....		151
LIST OF CASES .....		155
REPORTS .....		159

CHAPTER 1INTRODUCTION1. PRELIMINARY NOTE

In this thesis I intend to show the extent to which sentences imposed by magistrates in South Africa, for the crimes referred to in the topic reveal the influence of government policy. The discussion will include sentences which were considered by the Supreme Court on review or on appeal in reported judgments and some statistics relating to samples of sentences imposed for the relevant crimes in the Lower Umfolozi (Empangeni) District Magistrate's Court during a stated part of 1984. The law will be stated as at 31 December 1984.

In the Republic of South Africa about 90 per cent of all criminal proceedings are conducted in the magistrates' courts.<sup>1)</sup> Accordingly, about 90 per cent of sentences are imposed by magistrates. In this discussion magistrates include regional magistrates. Courts of district magistrates and those of regional magistrates are classified as lower courts.<sup>2)</sup>

- 
- 1 The Second Interim Report of the Commission of Inquiry into the Structure and Functioning of the Courts in the Republic of South Africa (which came to be called the "*Hoexter Commission*") RP 35/1981 1. The Commission was appointed by the State President on 29 November 1979.
  - 2 Magistrates' Courts Act 32 of 1944 as amended, section 1 of the Criminal Procedure Act 51 of 1977.

The maximum ordinary punitive jurisdiction of a regional magistrate's court is ten years or a fine of R20 000 and that of a magistrate's court is twelve months' imprisonment or a fine of R2 000.<sup>3)</sup> A statute may empower the court to impose punishment exceeding those I have referred to. A magistrate may commit a convicted accused person to a regional court for sentence if the accused, in the opinion of the court, deserves punishment beyond its jurisdiction.<sup>4)</sup>

One of the most difficult tasks facing a presiding judicial officer in criminal proceedings is deciding whether to impose a custodial sentence or a non-custodial one or to suspend the operation of the sentence in cases which allow the judicial officer a discretion. Van Rooyen and Joubert refer to this decision as the "*primary decision*".<sup>5)</sup>

The authors state: "*Once this primary decision is taken the secondary decision is usually easier, i.e. to decide upon the exact term of imprisonment or to which non-custodial form of punishment to impose*".<sup>6)</sup>

The authors correctly point out that "*In these often extremely difficult decisions, which may have far-reaching implications not only for the accused, but also for the victim, the accused's family, the victim's family, the reputation of the court and of the law, the criminal justice system (especially the prisons department) and the society at large, the key principle is that the courts are entrusted with a sentencing discretion. A discretionary power generally involves a choice amongst various options permitted by law, which choice must be exercised according to legal requirements and with due regard to all the relevant facts. A discretionary power therefore excludes both the power to act arbitrarily, and the existence of hard and fast rules which dictate the decision of the court.*"<sup>7)</sup>

---

3 Magistrates' Courts' Act - section 92(1)

4 sections 114 and 116 of the Criminal Procedure Act

5 van Rooyen, J H and Joubert, J J '*Sentencing and Punishment*' contained in Bosman F '*Social Welfare Law*' 1982 115

6 Ibid

7 at 115-116. See 3 of this chapter

## 2. THE INDEPENDENCE OF MAGISTRATES

Magistrates are civil servants employed by the Department of Justice and governed by regulations of the Public Service Commission.<sup>8)</sup>

Magistrates, therefore, do not enjoy the independence of judges of the Supreme Court.<sup>9)</sup> Judges are appointed by the State President acting on the advice of the Executive Council.<sup>10)</sup> Magistrates are appointed mainly from the ranks of public prosecutors.<sup>11)</sup>

The Hoexter Commission reports as follows:

*"The image of criminal justice in our lower courts is impaired by the observance of administrative arrangements incompatible with the standards of judicial aloofness expected of magistrates. It often happens, for example, that the magistrate and the public prosecutor share the same motor car and are seen to arrive together at the seat of the court where the trial is about to take place."* 12)

It is sometimes said that magistrates, in administering justice, 'must

---

8 Public Service Act 54 of 1957 - sections 3, 6 and 26 Ferreira, J C 'Strafprosesreg in die laer howe' 2 ed 1979 17

9 Gordon, G "Judges and Justice" (1981) January - 'South African Outlook' 11 see infra

10 Supreme Court Act 59 of 1959 - section 10

11 Hoexter Commission - Second Interim Report 2

12 Fifth and Final Report, Part A at 27

heed departmental policy".<sup>13)</sup> Mr Justice Milne feels that "It is absolutely fundamental to judicial impartiality that there should be judicial independence".<sup>14)</sup>

"The foundation of our legal system, as of all civilised legal systems, is the existence of an independent judiciary. The part of our judiciary most in the public eye is the Supreme Court."<sup>15)</sup> Kentridge stated that all magistrates were public servants who were under the discipline of the Department of Justice and that this meant that not only their promotions but also their postings from one part of the country to another were in the hands of the Department of Justice. He also stated that nearly all magistrates were former public prosecutors who had been promoted to the magisterial bench and whose whole legal experience and background had been the prosecution of offences on behalf of the State.

He said that from the public point of view, the connection between the judicial branch and the prosecuting branch of the Department of Justice seemed too close. He continued to say that their position as public servants made magistrates vulnerable to governmental pressures.

It is suspected that, in considering the appointment or promotion of a magistrate, not only the interests of justice but also the promotion of government policy is considered. Judge President Milne had this to say:

---

13 Didcott, J M 'The Didcott Memorandum and other submissions to the Hoexter Commission' (1980) 97 SALJ 651 at 661

14 'Speech by the Honourable Mr Justice A J Milne to the Natal Law Society' (1980) 97 SALJ 453 at 456

15 Kentridge, S 'Telling the truth about Law' (1982) 99 SALJ 648 at 650

"Moreover, while no doubt some magistrates can and do resist it, there is insidious pressure built into the promotion system to please those who promote one to higher status and salary ..." 16)

The Hoexter Commission <sup>17)</sup>, among others, observed the following factors which affect the independence of magistrates:

- (i) the fact that district magistrates as well as regional magistrates were civil servants appointed in terms of the Public Service Act and were functionaries of the Executive, makes their independence suspect;
- (ii) magistrates, as public servants, are transferred without their consent. It is possible that a magistrate "*might be exposed to manipulation through such transfer*" and thereby the image of independent and efficient administration of justice is dented;
- (iii) for promotion and salary increases magistrates depend on merit assessment which is based on the reports by heads of their departments, regional merit committees and a central merit committee;
- (iv) a magistrate may be subjected to a departmental inquiry for alleged inefficiency or misconduct. If he is found to be inefficient or guilty of misconduct he may be discharged from the service or his salary may be reduced.

---

16 at 458

17 Fifth and Final report, Part A 74

Kentridge<sup>18)</sup> refers to a departmental circular which had been in existence for many years. He says that the circular urged magistrates to be cautious and restrained in making adverse comments in their judgments about police witnesses. He believes that the circular had been accepted by magistrates, apparently without protest. He states that such a directive would never have been tolerated by the Supreme Court Bench and that no public servant would dare send such a circular to judges of the Supreme Court.

If this allegation is true magistrates would comply with the policy. Failure to comply would probably jeopardise chances of promotion and would render the magistrate vulnerable to transfer to another district or to confinement to administrative work.

According to Mr Justice Didcott:

*"... even when they occupy the magisterial bench, civil servants are not truly independent, but must heed departmental policy ...".19)*

*"... Fear of prejudicing promotion may inhibit a true spirit of independence."20)*

---

18 at 655

19 at 661

20 Kahn, E 'Appointment of Magistrates as Judges' (1971) 88 SALJ 512 at 516

Judge J P G Eksteen states:

*"The magistrates are trained in the civil service to act as the administrative organ to carry out Government policy throughout the country."*<sup>21)</sup>

The judge stated that, on the other hand, judges are drawn from the ranks of the Bar,

*"Where they have been brought up and nurtured in a long tradition of fearless independence in no way subject to the pressure of powerful litigants or influenced in the least degree by the importance of their adversaries"*.<sup>22)</sup>

While the judge admires his father who was a magistrate and who

*"... always sought to uphold the highest ideals of the civil service and of the magistracy",*

he feels that:

*"If, however, the Government were to appoint civil servants to the Supreme Court Bench they must realise that their action can only serve to tarnish and diminish this brightest gem in the crown of our judicial system."* <sup>23)</sup>

---

21 *'From the address by the Honourable Mr Justice J P G Eksteen to the East London Attorneys' Association' (1971) 88 SALJ 517 at 519.*

22 Ibid

23 at 520

Reacting to the criticism of the suggestion that magistrates should be considered for appointment as judges of our Supreme Court, Mr J N Oberholzer, the Secretary for Justice<sup>24)</sup> said that the crux of the argument was that a civil servant did not possess the qualities to become a judge because the civil service background and training would prevent him from displaying fearless independence. He did not subscribe to the view that a person's courage is allegedly so adversely affected in the civil service that he can never again act fearlessly although he has been freed from the Government yoke. He stated that quite a number of former civil servants had in the past been appointed as judges and he challenged Mr Justice Eksteen to prove "*any manifestation of constraint or partiality on their part*". Mr Oberholzer said that their magistrates were proud of a tradition of independence and impartiality which stretched over many years. He said that he had at his disposal glowing testimonials about magistrates which had been given by judges and other jurists who were highly thought of in legal circles.

Dr L C Steyn's appointment to the Transvaal bench from the civil service and his subsequent promotion to the chief justiceship was unpopular.<sup>25)</sup>

Cameron writes: "*But his record as a judge has vindicated him, it seems to be thought, and has shamed his critics*".<sup>26)</sup> Beinart says:

---

24 'Press statement by the Secretary for Justice, Mr J N Oberholzer, of 25-6 August' (1971) 88 SALJ 522

25 Cameron E, 'Legal Chauvinism, Executive-mindedness and Justice - L C Steyn's impact on South African Law' (1982) 99 SALJ 38 at 39. See also Beinart, B 'Aan sy edele doktor L C Steyn - voorsitter van die Vereniging Hugo De Groot' (1973) 36 THRHR 337 at 338

26 at 39

"The favourite criticism which was used then was that he had not participated in the hurly-burly of legal practice, a phrase I have never fully understood in its relevance to judicial aptitudes. There may be much hurly in practice but not so much burly, and I have yet to be persuaded that every member of the bar has brought distinction to the bench when appointed. The true test is surely the legal knowledge and expertise of the appointee, his intellectual capacity and his experience in the affairs of men, his general learning and culture, humanity, integrity and impartiality. Practice at the bar is certainly an excellent, but not necessarily the only, way of acquiring these attributes and virtues."<sup>27)</sup> The author said that he hoped that Dr Steyn's example would serve to make possible the recruitment in small numbers to the judiciary of some persons other than those of the bar, in particular from the universities, "To give some academic leavening, provided, of course, such persons have the qualities and experience I have described".<sup>28)</sup>

There is so much weight against the appointment of civil servants to the bench that such appointment should not be supported.

Mr Justice Eksteen emphasized that, because our judges had been brought up in a tradition of fearless independence, the outlook of our judiciary had been shaped and had been made what it was.<sup>29)</sup> The judge said that, as a result of the tradition of fearless independence our judiciary was held in the highest esteem throughout the civilised world. He said

---

27 at 338-9

28 at 339

29 at 519

that even the most stringent critics of this country readily conceded that however much they might dislike this country and its policies our judiciary stood beyond reproach and commanded their respect.<sup>30)</sup> The judge continued to say: *"Speaking as a member of this judiciary I would not take any real credit for this esteem as being solely that of the members of the judiciary. It is really the esteem in which our whole legal profession is held. Without the great traditions of our Bar and our Side-bar, the Bench, which is merely the product of the legal profession, could not possibly have any esteem of its own. It is because our judges are drawn from the profession with its great traditions of independence that they are what they are."*<sup>31)</sup>

On the other hand, the judge said, such tradition was not in the civil service and that it would be a very bad civil service if it had. The civil service had other high traditions which were indispensable to our way of life in a democratic country. Such traditions included those of loyalty to whatever Government might be in power irrespective of political views of civil servants, traditions of responsibility towards the Government whose policy they must carry out and responsibility towards the citizen in respect of whom they carried out that policy.

No magistrate shall perform the functions of a judicial officer in any magistrate's court unless he has taken an oath or made an affirmation subscribed by him as follows:

---

30 at 520

31 Ibid

32 Ibid

"I .....(full name)  
do hereby swear/solemnly and  
sincerely affirm and declare  
that whenever I may be called  
upon to perform the functions  
of a judicial officer in any  
magistrate's court, I will  
administer justice to all persons  
alike without fear, favour  
or prejudice and as the  
circumstances of any particular  
case may require, in accordance  
with the law and customs of  
the Republic of South Africa  
or of the territory of South  
West Africa."33)

Until the contrary is proved, every judicial officer is presumed to be bound by this oath in his administration of justice.<sup>34)</sup> From what has been said it can be concluded that not all magistrates will be brave to "Administer justice to all persons alike without fear, favour or prejudice".

Wacks states that

"To administer justice ...  
in accordance with the law  
and customs of South Africa  
constitutes a contradiction  
in terms that provides our  
judge with his moral dilemma."35)

Wacks deals with judges of the Supreme Court. He asks the question whether or not a judge should apply the law he finds morally indefensible.

---

33 Magistrates' Courts' Act - section 9(2)(a)

34 Radebe 1973 1 SA 796 (AD) at 813 F

35 Wacks, R "Judges and Injustices" (1984) 101 SALJ 266 at 268.

He states that by taking the oath a judge provides himself with a moral dilemma. The same may be said of a magistrate. The meaning of "customs" apparently includes procedures. Should the oath bind a magistrate to follow instructions relating to court procedure, issued by his department? From what has been said it is possible that his position in the public service would be jeopardized if he refused to carry out the instruction.

In the Holy Bible we read that, before He was crucified, Jesus Christ was accused of many crimes by the chief priests. His case was tried by Pilate, the Roman governor. Although Pilate was convinced that Christ was innocent he eventually convicted Him and sentenced Him to death because he was "*afraid of a riot and anxious to please the people*".<sup>36)</sup> The judgment of Pilate indicates that an adjudicator who lacks fearless independence can consciously cause a miscarriage of justice. Until magistrates are freed from the chains of the civil service, miscarriages of justice, including imposition of unduly severe sentences, can be expected to occur.<sup>37)</sup>

Ashworth states that judges often have to determine the balance between the individual and the State and that they should therefore be in a position to administer justice without fear or favour.<sup>38)</sup> This statement applies with equal force to magistrates. Ashworth discusses the relationship between the legislator, the judiciary and the executive in matters of sentencing. He asks the first question: "*Is legislative*

---

36 'The Living Bible' British ed 1974: Mark 15 verses 1-15 and Luke 23 verses 1-24

37 see infra

38 Ashworth, A: '*Sentencing and Penal Policy*' 1983 58

*curtailment of judicial sentencing discretion unconstitutional?"* Having referred to works of Jennings,<sup>39)</sup> a constitutional lawyer, Ashworth's answer to the question is that courts are subordinate to the legislature and that they are therefore constitutionally bound to apply statutes duly enacted by Parliament.<sup>40)</sup>

Jennings, in his discussion of the British courts and the constitution, states that one of the characteristics of the courts is their subordination to the legislature.<sup>41)</sup> The powers of the courts can always be diminished or reduced by legislation. The author states that the courts have recognised the claim of Parliament to pass legislation on any subject whatever and to make whatever provision it thinks fit. The courts are therefore bound by legislation.<sup>42)</sup>

The position of courts in Britain is similar to that prevailing in South Africa. Their sentencing discretion, especially in statutory offences, is conferred or removed by the legislator. It will be shown in Chapter III of this work that at some stage magistrates who had to sentence accused persons convicted of dealing in dagga had very limited sentencing discretion as the legislature had prescribed minimum sentences.

The second question asked by Ashworth is: "Are executive attempts to influence the judiciary unconstitutional?" He answers this question as

---

39 Jennings, W I: 'The Law and the Constitution' 5 ed 1959 241-2

40 at 59

41 at 241-2

42 at 242

follows: "The courts should not be subject to criticism or influence by members of the executive. It would surely be unconstitutional for the Government to 'pack' the bench with sentencers of a particular persuasion, or to attempt to exert influence over the sentence to be passed in a particular case, and Home Secretaries have traditionally declined to comment on sentences in particular cases".<sup>43)</sup> The proper role of the executive is, according to Ashworth, "service the courts, providing facilities and information and ensuring that (subject to the exercise of executive review, through the parole system or the prerogative of mercy) the sentence of the court is duly carried out."<sup>44)</sup>

In his discussion of British democracy, Jennings states that the first clearly necessary institution is an honest and impartial administration of justice. British judges take orders from nobody except Parliament and superior courts. The author states that "although sometimes the judges have been appointed because of their political success, they do their best to be impartial, and they would openly and forcibly spurn any attempt at political pressure."<sup>45)</sup>

It is interesting to note that in America the appointment of judges of the Supreme Court is influenced to a large extent by political considerations. Tresolini and Shapiro state that "Party membership and activity have always been of utmost importance in the selection of

---

43 at 63

44 Ibid

45 Jennings, W I: 'The British Constitution' 4 ed 1962 at 199

justices. Rare indeed are instances when a President has appointed a man to the Supreme Court who is not a member of his own political party".<sup>46)</sup> The authors state that, in making Supreme Court appointments, the President is interested in placing men on the bench who "actively share his views on the important social, political and economic issues of the day."<sup>47)</sup> One can only hope that such appointments do not influence the independence and impartiality of judges, particularly in cases where the government is interested and in those involving parties opposed to views shared by the President's political party. As justice must be seen to be done, political appointments to the bench should not be supported. It is a practice which is juridically impure.

The underlying consideration in judicial independence is the belief that the judicial function demands impartiality.<sup>48)</sup> "Strict impartiality is, of course, unattainable, for it involves not merely the absence of control but the absence of prejudice. Judges do their best to achieve impartiality, and in private matters they usually succeed."<sup>49)</sup>

The author states that some legislation directed to social ends can never be so precise as to leave no scope for differing interpretation and that the rules of interpretation are not so definite that the judge applying them can altogether exclude consideration of policy.

---

46 Tresolini, R J and Shapiro, M: 'American Constitutional Law' 3 ed 1971 44

47 at 45

48 Jennings (1959) 245

49 Ibid

"Where, for instance, a statute gives a public authority power to interfere with private rights, that power may sometimes be interpreted either narrowly or widely - "liberally", as it is sometimes put. Judges in fact differ on these matters, and it is sometimes possible to forecast on which side a particular judge will be found. It is quite impossible to exclude subjective notions."<sup>50)</sup> The author seems to condone the bias which flows from "the inevitable unconscious prejudice". Such bias differs from that which emanates from the dependence of the judicial officer.<sup>51)</sup>

### 3. POLICY, PRINCIPLE AND DISCRETION

These concepts are interrelated, as such they cannot be discussed separately.

It has already been stated that the purpose of this thesis is to show the extent to which government policy influences sentences imposed by magistrates on accused persons convicted of the mentioned crimes. Dworkin defines policy as "... that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)".<sup>52)</sup>

---

50 Ibid

51 Ibid

52 Dworkin, R 'Taking rights seriously' 1977 22

Closely related to policy is principle. A principle is defined as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality".<sup>53)</sup>

Ashworth distinguishes between penal policy and sentencing policy. "... penal policy is for the government and sentencing policy is for the courts."<sup>54)</sup> Ashworth defines penal policy as "that part of criminal justice policy which determines the measures which should be available to the courts and the precise form they should take."<sup>55)</sup> The author states that, in terms of penal policy, the legislature provides courts with new statutory measures which they might use in sentencing offenders. "By increasing the alternatives to immediate custodial sentences; it has been hoped to exert some influence over the number of occasions on which the courts resort to immediate custody".<sup>56)</sup> "... attempts by the executive arm of government to influence sentencing policy are unconstitutional; attempts by the legislature to interfere with the sentencing discretion of the courts are, even if not strictly unconstitutional, bound to result in both practical confusion and injustice to defendants; the development of sentencing policy should therefore be left to the wisdom of the courts, under the guidance of the Court of Appeal, and intervention by other bodies can only worsen the situation."<sup>57)</sup>

---

53 Ibid

54 at 98

55 at 112

56 at 112 See also Thomas, D A 'Principles of Sentencing' 2 ed 1979 3

57 Ashworth 59 See also Thomas 3

The Legislature is the appropriate body to formulate policy, including sentencing policy. The function of the court "is to apply to the individual case the general rules laid down by parliament - A process which may conveniently be termed 'individuation'." 58) Ashworth states that the process of individualisation is in practice not merely a question of rule-application. It often involves a great deal of interpretation before a statutory provision can be applied in a particular case. In this respect the role of the courts can be said to be creative. But the creative role ought to be exercised "within, and to the furtherance of, the policies implicit in the legislation." 59)

In interpreting some of the selected statutory provisions some magistrates were influenced by the policy of the executive. The result was that they imposed inappropriate sentences.

In his discussion of the development and administration of penal policy in England and Wales, Thomas states that the legislature "creates two distinct systems of sentencing, reflecting different penal objectives and governed by different principles." 60) Where the sentencer is presented with a choice, he may, usually in the interests of general deterrence, impose a sentence aimed at reflecting the offender's culpability or he may, in an endeavour to influence the future behaviour of the offender, subject him to an appropriate measure of supervision, treatment or preventive confinement. 61) Thomas distinguishes between what he refers to as "a tariff sentence" and "a sentence based on the needs of the offender as an individual". Having made the primary decision

---

58 Ashworth 61

59 Ibid

60 at 8

61 Ibid

between the two, the sentencer must decide which objective should prevail in the particular case. In making this decision the sentencer must apply the appropriate body of principle to determine the precise form of the sentence or measure he will adopt. There is a difference between principles applicable to tariff sentences and those which govern the selection of individualised measures.<sup>62)</sup> The author states that "... the detailed criteria which affect the final choice of sentence depend on the primary decision, as do the significance of particular factors in the case and the relevance of various items of information about the circumstances of the offence or the background of the offender. It follows that a sentence which would be considered inappropriate as an application of tariff principles may be considered entirely correct if it is seen as an individualised measure based on the court's assessment of the needs of the offender as an individual, and the converse is equally true."<sup>63)</sup>

Reference to the concept of denunciation may justify a tariff sentence. According to Thomas, denunciation is "the theory that if the law fails to impose a sentence of substantial severity for a particular class of offence, the gravity with which it is, viewed by society will diminish and increasing tolerance lead to more frequent occurrence."<sup>64)</sup> An accused person who has been convicted of an offence which constitutes a breach of trust or an abuse of privilege usually attracts a tariff sentence, although in the absence of this relationship the offence might not be viewed in that serious light.<sup>65)</sup>

---

62 Ibid. See van Rooyen and Joubert 115-116

63 at 8-9

64 at 15

65 Thomas at 15. See also Hiemstra, V G 'Suid-Afrikaanse Strafproses' 3 ed 1981 at 583

The characteristics of the offender can identify cases in which the primary decision is likely to be in favour of an individualised measure. According to Thomas, four types of offenders, namely, young offenders usually under 21 years of age, offenders in need of psychiatric treatment, recidivists who appear to have reached a critical point in their life and persistent recidivists who are in danger of becoming completely institutionalised as a result of repeated sentences of imprisonment are normally considered particularly suitable for individualised measures. Unless an offence committed by an offender in one of these categories is so serious that the case for a tariff sentence is overwhelming, or his previous convictions to such measures indicate that such an approach would be worthless, he will normally be dealt with by individualised measures.<sup>66)</sup> The relevance of the concepts "*tariff sentence*" and "*individualised sentence*" in this discussion will be shown in cases discussed in chapters II, III and IV.

From what has been said it is clear that, under normal circumstances, a court with the duty of imposing punishment, has a discretion as to the extent of the punishment to be imposed. That courts should not have a discretion in imposing sentences is undesirable. Circumstances in which offences are committed and the circumstances of accused persons differ. The court should impose punishment which is appropriate to the nature of the crime and the circumstances of the accused. "*Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*".<sup>67)</sup>

---

66 at 17-18. See also Rabie, M A and Strauss, S A: '*Punishment - an introduction to Principles*' 3 ed 1981 at 227, Hiemstra at 583

67 per Holmes J A in Kumalo 1973 3 SA 697(AD) at 698: See also Zinn 1969 2 SA 537 (AD) at 540G

However, certain circumstances justify the imposition by a court of a specific punishment. If, in a statute, the legislature denies courts discretion in sentencing, courts must abide by the statutory provision.

Principles of sentencing are developed by our superior courts. A superior court which gives a reasoned judgment on appeal or review will draw up relevant principles.<sup>68)</sup>

Failure by a judicial officer to act in accordance with established principles of sentencing constitutes a misdirection. "*... an error in the assessment or application of the factors relating to sentence constitutes a misdirection if it involves a failure to act in accordance with the established principles of sentencing or if the court is mistaken as to the existence or effect of a principle of sentencing*".<sup>69)</sup>

---

68 Ashworth 62 see, for example, Zinn and Kumalo cases and those discussed in Chapters II, III and IV.

69 Lund, J R '*Discretion, Principle and Precedent in Sentencing*' Part II (1980) 4 SACC 36 at 44-5.

CHAPTER IISENTENCES IMPOSED FOR CONTRAVENING THE IMMORALITY ACT<sup>1)</sup>1. INTRODUCTION

When one reads the whole Act one gains the impression that the Legislature aimed at preventing acts of indecency. It is further clear that the Legislature intended that in certain circumstances contraventions of the Act be punished with heavy penalties. The sections under discussion do not contain provisions for minimum sentences.

2. SECTION 16 (Sexual offences between Whites and Coloureds)2.1 Preliminary note

The Act<sup>2)</sup> defines "*Coloured person*" as any person other than a White person.

The contravention of the section is punishable with imprisonment for a period not exceeding seven years. Where necessary, facts of cases, reasons for sentences and remarks of reviewing judges or judges of appeal will be given.

1. supra.

2. section 1.

## 2.2 Policy

In the discussions at the third reading of the Bill, the Minister of Justice, among others, said that the measure had been adopted as early as 1927 to make it legally punishable "... if there was sexual intercourse between Whites and Natives". The Minister further said that people who would come to South Africa from abroad had to be affected by the Act and that they would be expected to behave like South Africans so that South Africans would not be "a bastard race" and that they would not "come into our ports and bastardize our people".<sup>3)</sup>

In H and Another Marais, J said:

"... in the present Act the prohibition covers not only the sexual act but all or almost all behaviour of a sexual nature between White and Coloured persons. ... The policy underlying these prohibitions is common knowledge, namely, to punish all overt tendency towards sexual intimacy between White and Coloured, because it is calculated to frustrate the State policy of maintaining the two races distinct".<sup>4)</sup>

## 2.3 Cases

In W en n Ander<sup>5)</sup> The two accused had been convicted by a magistrate

---

3. Hansard, 14 February 1957 Columns 1141 and 1143.

4. 1959 1 SA 803 (TPD) at 804.

5. 1959 2 SA 179 (CPD).

of contravening the section. The first accused, a White man had committed an immoral act with the second accused, a Coloured woman. The first accused had associated with non-Whites and had already lived with the second accused as husband and wife for a period of one year and eleven months. One child had been born of the relationship. The second accused had two other children. The magistrate had sentenced each of the accused to imprisonment for four months.

The two accused were, apparently, first offenders. On review, Van Wyk, J said that the Immorality Act should be applied humanely and that in the case of a person who was "*technically a white*" but had already undergone a change of "*colour*" because of his association with non-Whites, a severe punishment should not be imposed. The judge further said that each case must be dealt with on its own merits and that no general rule could be laid down. The sentences were altered to imprisonment for fourteen days with compulsory labour.

The judge correctly assessed the circumstances in which the offence had been committed and allowed an appropriate sentence. The magistrate could have suspended the operation of the whole or portion of the sentences.

In D<sup>6)</sup>, the appellant, a White male of 65 years of age and of poor health had attempted to have carnal intercourse with a Coloured woman. He had been charged jointly with the woman. The woman had also been convicted. The magistrate had sentenced the appellant to imprisonment

---

6. 1960 1 SA 151 (C P D) at 152.

for four months with hard labour of which two months were conditionally suspended for three years. The woman had been sentenced to imprisonment for three months with compulsory labour of which two months were conditionally suspended. On appeal the court said that the fact that the appellant was a first offender of advanced age and poor health had to be considered. Other considerations were that the appellant had been living alone in his room and that the Coloured woman had assisted him at times to clean, to prepare food and to attend to his clothing and laundry.

Bloch, J further considered the fact that the appellant

*"occupies a place very low in the strata of European society ... to punish him as if he possessed the moral inhibitions and the class and colour consciousness of a better privileged European, seems to me to ignore entirely the human and personal factors which must always be taken into account in assessing punishment ... I cannot think that sending this old man to prison for a first offence of this nature is required either by law or by society, or that it will serve any purpose whatever".*

The sentence was struck out and was altered to imprisonment for one month with compulsory labour, the whole sentence conditionally suspended for two years. The magistrate had ignored factors which were favourable to the accused. Persons who contravene this offence are not otherwise criminally inclined. In cases such as this, courts should show leniency.

With respect, I disagree with Schreiner, J A who states in L:

*"If the legislation imposes so severe a strain on persons not otherwise criminally inclined that a change in the law is thought to be desirable, this must be done by Parliament itself. Courts cannot properly give effect to any views that they may hold as to the harshness of the provisions in the face of the manifest purpose of Parliament that such offences should be dealt with severely."*7)

When the Legislature provides in a statute harsh penalties, it does not thereby do away with the discretion of the court, unless it provides mandatory sentences. The penalty contained in section 16 does not interfere with the discretion of the court. In suitable cases courts may impose lenient sentences. In casu the accused, a White man aged 37 years, married with two children, had enticed, solicited or importuned a Black female to have unlawful carnal intercourse with him. The magistrate had sentenced him to three months' imprisonment. He had unsuccessfully appealed to the Provincial Division.

The accused had appealed further to the Appellate Division. In mitigation of sentence, the appellant, a first offender, had said that he had, on the night in question, drunk a "good deal of liquor" and that he was an alcoholic.

Schreiner, J A was of the opinion that the sentence imposed by the

---

7. 1960 3 SA 503 (A) at 507.

magistrate was not more severe than the general level of those imposed for such offences. It is an established principle of our law that there should be individualisation of sentence.<sup>8)</sup> Emphasis should not, therefore, be laid on uniformity of sentences. Botha, J A expresses himself as follows on this aspect:

*"Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged."* 9)

Forst has this to say about uniformity and disparity of sentences:

*"Acceptance of the individualised sentencing model did not make judges immune to criticism for some variations in sentencing. Even the strongest supporters of individualised justice condemned sentencing inequalities that derived from bias against race, religion and social class, nationality and similar factors not related to the aims of the rehabilitative philosophy. Supporters of individualised sentencing, however, viewed most sentencing variations as legitimate, justified by individual differences in offenders that were related to rational correctional goals".* 10)

---

8. Rabie and Straus Scheepers 1977 2 SA 154 (AD)

9. Reddy 1975 3 SA 757 (A D) at 759. See also Ferreira 684 Rabie and and Strauss 228-230

In Maseko and Others,<sup>11)</sup> Davidson, J said that uniformity was a dangerous and undesirable character to imprint on sentences in which the reasonable discretion of the judicial officer should be exercised. He further said that an automatic imposition of a type of sentence, without exercising a discretion, may often result in unduly severe sentences.

In this case the accused was a first offender who had, as alleged, taken liquor, and was married with two children. He had merely enticed, solicited or importuned a Black female. Justice would have been done if the appellant had been sentenced to imprisonment for one month, the whole sentence conditionally suspended.

In B,<sup>12)</sup> a Black woman had been sentenced by a magistrate to imprisonment for 120 days. Her partner, a White male had been tried separately on the same charge and had, on conviction been sentenced to imprisonment for 180 days which, owing to his poor health and advanced age, had been conditionally suspended for three years. The attention of the reviewing judge had been drawn by the Attorney-general to a directive from the Minister of Justice which was contained in Circular number 6 of 1959 to the following effect:

*"Sy Edele die Minister van Justisie het ook aangedui dat alle gevalle waar 'n blanke en 'n nie-blanke weens 'n beweerde geslagsdaad deur hulle gesamentlik gepleeg onder Ontugwet, 1957, skuldig bevind word wat tot gevolg het dat een veroordeelde gevangenisstraf moet ondergaan terwyl die ander weens die feit dat sy/haar vonnis opgeskort word of om 'n ander rede nie gevangenisstraf moet ondergaan nie, ook na hom verwys moet word."*

---

11. 1972 3 SA 348 (TPD) at 351.

12. 1965 3 SA 17(E)

The reviewing judge confirmed the sentences, but in respect of the Black woman he ordered that she was to be released on bail on her own recognisances until 31st May 1965. The reviewing judge, however, emphasized the principle that where the sentence imposed in a magistrate's court is in itself proper and just, the mere fact that there is a disparity between such sentence and that of another person charged with the same crime does not entitle the court automatically to interfere. As sentences should be individualised<sup>13)</sup> the view of the reviewing judge is in accordance with justice.

The statement of the Minister of Justice in the discussions of the third reading of the Bill<sup>14)</sup> that foreigners would not "*come into our ports and bastardize our people*" was confirmed by the magistrate in E.<sup>15)</sup> In this case the accused, a foreign (Greek) seaman had been sentenced by the magistrate to four months' imprisonment. In a written statement, in mitigation of sentence on behalf of the accused, it was said that the accused was a native of Athens in Greece, "*a cosmopolitan city where no social stigma attaches to any Greek who cohabits with a non-European*" and that it was the accused's first visit to South Africa "*and he was therefore not familiar with the laws and customs prevailing in South Africa*".

In his reasons for the sentence the magistrate had stated that if a foreign seaman received a suspended sentence this would allow

---

13. supra.

14. supra.

15. 1966 2 SA 339 (NPD)

*"such seamen to contravene the law without fear of being dealt with severely ... suspended sentences in such cases can have no deterrent effect".*

Caney, J found this to be a misdirection on the part of the magistrate. The judge ordered that the whole sentence be conditionally suspended for three years. The sentence imposed by the magistrate was clearly influenced by policy considerations. Such considerations had overshadowed many mitigating factors, namely, absence of previous convictions, lack of familiarity with the law (ignorance of the law), non-belief in the policy of apartheid and that the accused might lose his employment if he was imprisoned.

Another sentence in which the magistrate misdirected himself was imposed in P.<sup>16)</sup> The accused, a young man of 23 years of age had had sexual relations with a Coloured woman. The magistrate had sentenced him to imprisonment for six months of which three months had been conditionally suspended. The accused had one unrelated previous conviction.

In mitigation of sentence the accused had stated that he had a wife and a child and that his wife was expecting a child. The magistrate had made the following remark:

*"... but the penalty clause of this statute is very severe and suspension of a sentence to be imposed entirely would be making light of serious things".17)*

---

16. 1967 2 SA 228 (NPD).

17. at 229.

Caney, J said:

*"The magistrate, in my view, clearly misdirected himself in so far as he considered that a suspension of the whole of the sentence would be making light of a serious matter. In the first place the Legislature has left unfettered the court's discretion to suspend a sentence of imprisonment imposed for a contravention of section 16 of the Immorality Act."* 18)

The judge further said that the Legislature had in mind that in appropriate cases the courts should be free to suspend the whole of a sentence passed on an accused. The judge stated that in the case of first offenders, in recent years, the whole of the sentences imposed were suspended.

The judge ordered that the whole of the sentence be conditionally suspended for three years. The views of the judge are acceptable.

In O and Another <sup>19)</sup>, the two appellants, a White male and a Black woman, respectively, had or had attempted to have unlawful carnal intercourse. The magistrate had sentenced each of the accused to imprisonment for six months with compulsory labour. In addition, the first appellant (the White male) had been sentenced to a whipping of four strokes. In his reasons for the sentence the magistrate had stated that the first appellant had previously been acquitted on a similar charge and that he had thus been forewarned. The magistrate

---

18. at 229.

19. 1959 4 SA 695 (NPD).

had further stated:

*"Accused did not just go in for one act of immorality but practically every night slept in the huts with Native females, kissed them etc. ..."*

On appeal, Broome, J P said that it was without justification to take into account a convicted person's previous acquittals for purposes of sentence. The Judge President did not regard corporal punishment as an appropriate punishment for this type of offence, unless there were aggravating circumstances. He did not find such features in this case and considered the sentence against the first appellant unduly severe. The sentence was reduced by deleting the whipping. Otherwise the appeals against sentences were dismissed. The record does not indicate whether or not the two accused were first offenders. From the magistrate's reasons for the sentence it appears that the first appellant had not previously committed the offence or a related one. The fact that the first appellant had associated with Black females per se did not justify a severe sentence. In W en n Ander<sup>20)</sup> this factor justified a lighter sentence. Accordingly, although the whipping was deleted, the sentences remain unduly severe. Imprisonment for one month, conditionally suspended, would have been an appropriate sentence.

Five strokes were deleted in A and Another.<sup>21)</sup> In this case the first accused was a Coloured woman. The second accused was a 47 year-

---

20. supra.

21. 1959 3 SA 16 (CPD).

old White male. The two accused had attempted to commit immorality. The magistrate had sentenced each to five months' imprisonment, conditionally suspended for two years. The second accused had, in addition, been sentenced to a whipping of five strokes.

On review Bloch, J said that imposition of cuts for offences under the Immorality Act is not an appropriate sentence except where there are aggravating circumstances. In this case there were no such circumstances.

The judge said: *"Taking his age and the fact that he is a first offender into account, as well as the feature I have mentioned, namely, that there were no aggravating circumstances, it seems to me that it is the policy of our courts, clearly laid down in two cases I have mentioned, and several others, that cuts ought not to be imposed."* In giving evidence in mitigation of sentence, the second accused had asked the magistrate to sentence him to cuts. He had said: *"As dit die hof mag behaag, is dit my versoek dat lyfstraf eerder opgelê word as tronkstraf. Dit sal my en my huwelikslewe moontlik kan red."*

The judge said that the accused was not, in this case, as in any other case, the most fitting judge of what sentence ought to be imposed on him. The judge said that, that was a matter for the judicial officer to consider in the light of such guidance as decisions of the Supreme Court afforded him.

The sentences were confirmed but it was ordered that the five strokes be deleted.

The magistrate seems to have properly exercised his judicial discretion in E and Another.<sup>22)</sup> The appellant, a White male had picked up in his motor car the second accused, a Coloured woman who was a stranger to him. The appellant had driven to a sheltered spot where the two had made love with each other. The appellant was a German immigrant who had been in South Africa for about a year at the time when the offence was committed.

The appellant had been sentenced to four months' imprisonment conditionally suspended for two years. The sentence appears to be appropriate. The second accused had been treated as a juvenile and had been placed in the care of her father. On appeal by the first accused the sentence was confirmed.

Another German immigrant was involved in the case of I.<sup>23)</sup> He was 30 years of age and had been in South Africa for six months. He had no previous convictions. He had consumed '*a great deal of liquor*'. The magistrate had sentenced him to six months imprisonment.

On appeal it was said that the magistrate should have had more regard to the background of the appellant and other personal factors. The appeal court ordered that the whole sentence be conditionally suspended for three years. The sentence imposed by the magistrate who ignored several mitigating factors, is disturbingly inappropriate. He seems to have been conscious of the statement of the Minister of Justice that foreigners would not "*come into our ports and bastardize our people*",

---

22. 1960 4 SA 445 (CPD)

23 1968 2 SA 268 (CPD)

when he imposed the sentence.

Although the accused was of advanced age in J<sup>24)</sup>, he was sentenced by the magistrate to six months' imprisonment on each of the two counts of contravening the section. The accused had enticed, solicited or importuned the first complainant, an adult married Coloured woman to commit immorality with him. He had inserted his hand under her dress and touched her. He had held the second complainant, aged 13 years, by her arm, inviting her to have sexual intercourse with him and offering to pay her 10s. The accused had two previous convictions for indecency. He was 66 years old.

The accused had unsuccessfully appealed to the Transvaal Provincial Division. He had appealed to the Appellate Division. Dismissing the appeals, Schreiner, A C J said that, in the circumstances, it could not be said that the sentences were excessive.

It cannot be said in this case that the sentences were affected by policy considerations. There were aggravating factors, namely, two related previous convictions and the fact that the second complainant was a girl of 13 years of age. The advanced age of the appellant was outweighed by the aggravating factors.

The sentences imposed on the accused in H and Another<sup>25)</sup> do not seem to have been adversely affected by the policy of the government. The appellants were two White males. They had committed or attempted to commit immoral or indecent acts

---

24. 1958 4 SA 488 (AD)

25. supra.

with three Black women in the following circumstances. At 22h45 the two appellants had entered a building in Eloff Street in Johannesburg. The first appellant had beckoned the three women to follow them. The women had followed the appellants into the building. The watchman on duty at the entrance to the building had asked the appellants why they were taking the women into the building at that time. The first appellant had said that the women were going to clean their office.

The caretaker to whom the watchman had reported had unlocked the door of the office of the first appellant with his own key and had found two of the women naked and the third one almost naked. The magistrate had sentenced each to six months' imprisonment with compulsory labour, of which three months were conditionally suspended. On appeal it was argued on behalf of the appellants that the sentences were unreasonably severe. Dismissing the appeal, Marais, J said that the magistrate was correct in his reason for the sentences that, had the caretaker not intervened, intercourse would have taken place. The judge further said that the case was not one of sudden temptation brought about by circumstances beyond the control of the appellants but that *"it was a deliberate flouting of the law and they cannot be heard to complain at being sent to prison"*. The judge was of the opinion that the undressing of the women had been either instigated or permitted to take place by the appellants and that the women must have been solicited by the appellants elsewhere.

The record does not show whether or not the appellants had previous convictions. Even if they were first offenders, the circumstances

in which the offence was committed justified the sentences imposed by the magistrate.

Magistrates seem to have realised as from the late sixties that imposition of policy - orientated sentences was a futile exercise, as most of such sentences had been interfered with on appeal or review. As a result the number of sentences that were altered on review decreased considerably.<sup>26)</sup>

#### 2.4 Conclusion

According to the Minister of Law and Order <sup>27)</sup> during the period 1978 to 1982, 1233 people were charged with contravening the section in South Africa. The feeling is today that the section and the Prohibition of Mixed Marriages Act, 55 of 1949 should be removed from our statute book.<sup>28)</sup>

An attempt to obtain statistics of cases of contravening this section in some magistrates' courts was unsuccessful. Nowadays, as the figure given earlier suggests, very few people are charged with contravening this offence. Most of the few charges that are laid, are withdrawn. Seemingly, the reason is not that few people commit the offence nowadays but is, apparently, that the future of the policy has become doubtful.

---

26. see, for example. V 1968 4 SA 262 (NPD) W 1970 3 SA 346 (NPD) and R 1971 3 SA 787 (C P D)

27. Hansard, June 22, 1983 Column 1640

28. see views of Roman Catholic bishops in their memorandum to the Government's Commission inquiring into these laws ("*Natal Mercury*" December 20, 1983) and Bekker, J C - "*Rol van die regsprekende gesag in 'n plurale samelewing*" Verslag Pol-21 HSRC. Pretoria 1983 at 21.

Some magistrates went all out to impose sentences which they believed would do the country good "so that South Africans would not be a bastard race".<sup>29)</sup> The magistrates ought to have considered that in contravening this section "... there is no question of an offensive exhibition or nuisance, no question of harm to the young or those in need of special protection and no threat to public order".<sup>30)</sup>

Some of the cases which have been discussed show that in over-emphasizing Government policy, magistrates did not consider the provisions of the then section 352<sup>31)</sup> (now section 297)<sup>32)</sup> which provided/provides for suspension of a sentence. The Immorality Act does not prohibit the application of the section. It is therefore a misdirection to hold, as was said in P that:

"... that the penalty clause of this statute is very severe and suspension of a sentence to be imposed entirely would be making light of serious things." 33)

It is trusted that the Government's Commission presently considering the Immorality Act and the Prohibition of Mixed Marriages Act will recommend that this section which has caused serious criticism and

---

29. see the speech of the Minister of Justice (supra)

30. Burchell, E M, Milton, J R L and Burchell, J M - "South African Criminal Law and Procedure" Volume 1 2 ed 1983 6. See also Hart, H L A - "Law, Liberty and Morality" 1963 59.

31. of the repealed Criminal Procedure Act, 56 of 1955.

32. of the present Criminal Procedure Act (supra).

33.. P case (supra) at 229

embarrassment to magistrates and the Government, be repealed. Burchell, Milton and Burchell ask this question:

*"Is the law entitled to punish immorality merely because it is immorality, i.e. without pointing to any harmful consequences?" 34)*

The fact that contravening the section does not constitute a criminal act in the true sense ought to serve as a mitigating factor, especially because such an act is, as far as is known, punishable only in this country.

Were it not for the intervention of reviewing judges and judges of appeal some convicted persons would have served unreasonably severe sentences imposed by magistrates who believed that they were promoting government policy.

### 3. SECTION 14 (Sexual offences with girls under 16 years of age and boys under 19 years of age)

#### 3.1 Introduction

Under this section two cases showing policy-orientated sentences will be discussed.

Contravention of this section is punishable with imprisonment for

a period not exceeding six years with or without a fine not exceeding R1 000 in addition to such imprisonment.

### 3.2 Cases

In H<sup>35)</sup> the accused had contravened the section by having sexual intercourse with a female person under the age of 16 years. The accused was 18 years of age but had been between 16 and 17 years of age at the time of commission of the offence. The magistrate had sentenced him to imprisonment for two months with compulsory labour.

The magistrate had ignored several mitigating factors, including the age of the accused, especially at the time of the commission of the offence, that the accused had been maintaining the child born of the sexual relationship, absence of previous convictions, and that imprisonment could result in the child losing its maintenance. On appeal it was held that the sentence was unreasonable. The appeal court ordered that the imprisonment be conditionally suspended.

In this discussion of unlawful sexual intercourse with girls over 13 and under 16 years, Thomas states that the most important sentencing consideration in case of unlawful sexual intercourse with girls between 13 and 16 is the age difference between the parties.<sup>36)</sup> *"Where the offender is himself only a few years older than the girl concerned, the usual sentence is a fine or conditional discharge, although an*

---

35. 1959 3 SA 583 (CPD)

36. at 121

*individualised measure such as probation will be considered appropriate if the general circumstances indicate a need for training or supervision".*<sup>37)</sup>

According to the author a prison sentence is likely to be upheld where the appellant has deliberately flouted the law by committing the offence with full knowledge of the circumstances and after appropriate warning.<sup>38)</sup> The cases discussed by the author reveal the following useful guidelines:

- (i) other aggravating circumstances, such as previous convictions, may justify a sentence of imprisonment despite the absence of a substantial difference in age.
- (ii) offenders beyond their early twenties are more likely to receive a sentence of imprisonment.
- (iii) the law intends that girls under 16 should be protected from men and from themselves.
- (iv) Although the age gap may be more than 10 years, a term of imprisonment may be reduced where the accused had sexual relations with a "willing" girl of 13 years who had previous sexual experience.
- (v) "*Sentences in excess of twelve months' imprisonment are likely to be upheld where, in addition to the difference in ages between the parties, the offence is aggravated by the existence of a relationship between them casting some obligation of care on the offender*".

---

37. at 121-2.

38. at 122

(vi) Unusual depravity and indifference to the welfare of the girl concerned constitute aggravating factors.<sup>39)</sup>

The magistrate had in mind the "... policy of maintaining the two races distinct"<sup>40)</sup> when he sentenced the accused in S.<sup>41)</sup> In casu the accused, a 47 year old White male and first offender, had, after a misunderstanding, caused his wife to leave him. He had started to indulge in liquor. He had performed an indecent act with a Black boy aged 15 years. The magistrate had sentenced him to imprisonment for six months of which four months were conditionally suspended.

In his reasons for sentence the magistrate had stated

*"... the fact that the appellant, a White person consorted with a Bantu youth aggravates the immoral or indecent act he committed with such youth".<sup>42)</sup>*

On appeal, Fannin, J said that in considering the punishment which ought to be meted out to a male person for committing an indecent or improper act with a boy under the age of 16 years, the race of the victim of the offence is irrelevant. After he had considered several mitigating factors the judge ordered that the whole sentence be conditionally suspended.

---

39. at 122-123

40. in H and Another (supra) at 805

41. 1965 4 SA 405 (NPD)

42. at 407

### 3.3 Conclusion

Although the section is a necessary measure to protect the young, courts should consider all relevant factors when sentencing those who contravene it.

## 4. SECTION 2 (Keeping a brothel)

### 4.1 Introduction

A brothel is defined as including any house or place kept or used for purposes of prostitution or persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose.<sup>43)</sup>

Contravention of the section is punishable with imprisonment for a period not exceeding three years with or without a fine not exceeding six hundred rand in addition to such imprisonment, or where it is proved that the person convicted kept a brothel and that unlawful carnal intercourse took place in such brothel to his knowledge between a White female and a Coloured male or between a Coloured female and a White male, for a period not exceeding seven years with or without a fine not exceeding R1 000 in addition to such imprisonment.

The sentences imposed by regional magistrates in the cases discussed hereunder clearly show that the offence is viewed in a serious light.

---

43. section 1 of the Act. (23 of 1957)

## 4.2 Cases

In K<sup>44)</sup> the appellant had kept a brothel. He had on more than one occasion suggested to a woman that she have intercourse with a particular man who would pay her. He had himself paid women on certain occasions for having intercourse with him. He was apparently a first offender.

The regional magistrate had sentenced him to 12 months' imprisonment. Dismissing the appeal, Williamson, J said that it could not be contended that the sentence was unreasonable.

A first offender should, as far as it is possible, be kept out of goal.<sup>45)</sup> *"There is the humanitarian argument that it is generally more humane to leave an individual with his family and (where applicable) his employment than to remove him from society".*<sup>46)</sup>

A sentence of six months' imprisonment of which three months were conditionally suspended would have been appropriate.

The sentence of 12 months' imprisonment of which six months were conditionally suspended, was altered on appeal in E.<sup>47)</sup> The appellant was

---

44. 1961 2 SA 381 (TPD)

45. Ashworth 429-430 Du Toit, E *"Straf in Suid-Afrika"* 1 ed 1981 57-9, 308 Hiemstra 578, 583 Harcourt, A B *"Swift's Law of Criminal Procedure"* 2 ed 1969 at 596 M 1979 2 SA 25 (AD) Rabie and Strauss 237.

46. Ashworth 429 Du Toit 60-62

47. 1967 3 SA 500 (NPD)

a White woman aged 27 years. She was a first offender. She had three young children. Her husband was unemployed as he was unable to obtain work. The appellant had not received any income for the prostitution of any other person except that of herself. She had appealed against the severity of the sentence. Milne, J P said that regard being had to the type of sentence generally imposed on persons convicted of contravening the section, the sentence imposed by the regional magistrate was inappropriate. The sentence was altered to one of four months' imprisonment conditionally suspended.

The case shows remarkable disparity between the sentence imposed by the regional magistrate and the one allowed on appeal. The sentence allowed on appeal is to be welcomed.

In H<sup>48)</sup> the appellant, a first offender aged about 28 years had kept a house or place for persons to visit for a "*lewd or indecent purpose*" in that male clients had visited his massage salon for the purpose of being given what was called "*pelvic massages*" by female assistants employed by him. The regional magistrate in Johannesburg had sentenced him to two years' imprisonment of which one year was conditionally suspended. The appellant had unsuccessfully appealed to the Transvaal Provincial Division. In his reasons for the sentence the regional magistrate had, among others, said that it was clear from the penalties provided for in the Act that the Legislature had considered contravention of the section in a very serious light.

---

48. 1977 2 SA 954 (A D)

He said:

*"The existence of this sordid type of institution in our community is contrary to our way of living. It can have no place in our society. In fact, should it be allowed at all, it will affect the very roots of our civilisation".*

As regards sentence it was contended by the appellant's counsel that the regional magistrate had misdirected himself in not approaching the question of sentence with due regard to the fact that the form of lewdness in this case was less serious than other forms of lewdness contemplated in the section. It was further contended that the regional magistrate had misdirected himself in taking the view that all forms of lewdness are to be dealt with on a uniform basis for the purpose of sentence. Lastly it was submitted that there should be a difference in sentence where the proprietor of a massage salon merely permits that form of lewdness, as was the case in this case.

Wessels, J A was of the opinion that a careful perusal of the regional magistrate's judgement on sentence did not justify the criticism implied in counsel's submission. He was further of the opinion that, in all the circumstances of the case, it could not be said that it was clearly inappropriate for the regional magistrate to have imposed a form of sentence upon the appellant, a first offender, which denied him the benefit of a wholly suspended sentence of imprisonment. He did not consider the period of imprisonment excessively severe. The appeal was dismissed.

It is a pity that the Appellate Division was not persuaded by sound argument by the appellant's counsel. With respect, it is incorrect that when the Legislature provides for heavy penalties, severe sentences should be imposed in cases where strong mitigating factors are present. If the Legislature intended that severe sentences should be imposed on all accused convicted of contravening the section it would have provided a minimum sentence. The Legislature was aware that the offence would be committed in different circumstances by accused persons of different personal factors, that is why it did not provide for a minimum sentence. From the regional magistrate's reasons for the sentence it appears that public policy was the main consideration.

I share the view that the magistrate misdirected himself, hence the sentence which induces a sense of shock. Six months' imprisonment of which three months were conditionally suspended would have been an appropriate sentence.

The appellant in M<sup>49)</sup> had kept a brothel between October 1974 and June 1975. He was a first offender. The regional magistrate had sentenced him to pay a fine of R300 or, in default of payment, to undergo 12 months' imprisonment. The appeal was against the conviction and was dismissed. The regional magistrate seems to have correctly considered the principle of sentencing that, as far as possible, first offenders should be kept out of goal. The appellant had kept or used a house or place for lewd or indecent purposes. He had held shows at regular intervals at his house in which Coloured girls performed various acts before an audience of White men. Some of the girls

undressed completely and danced. After the show, dancing had taken place between the girls and the audience and the appellant paid the girls. The record does not show whether or not the appellant was a first offender. From the fact that compulsory imprisonment was not imposed it is deduced that he had no previous convictions related to the present one.

The circumstances in which the offence was committed justified the sentence.

In P<sup>50)</sup> the appellant and two female accused had given pelvic massages to men who came to the appellant's salon. Evidence had shown that the appellant was the owner of two salons. He had no related previous conviction. He was apparently an adult person. Cillié, J P said that, although there was no indication that the regional magistrate had misdirected himself he found that there was a discrepancy between the sentence and the one he would have imposed and that he was therefore entitled to interfere. He felt that, that was not a case where compulsory imprisonment should have been imposed. The sentence was set aside and was substituted for by one of a fine of R200 or, in default of payment, to undergo six months' imprisonment, and a further six months' imprisonment conditionally suspended for three years.

The view of the Judge President that not all contraventions of this section justify compulsory imprisonment, is to be welcomed. After all, principles of sentencing apply even to what are known as serious

offences. As stated earlier, one of the principles is that, as far as is possible, first offenders should be kept out of gaol.

#### 4.3 Conclusion

The policy of the Department of Justice seems to be that keeping a brothel is the most serious of the three offences under this Act. Prosecuting authorities prefer to charge those alleged to have contravened the section before regional courts, expecting the latter courts to impose sentences beyond the jurisdiction of district courts. The circumstances in which the offence was committed and other relevant factors should determine sentences even in cases which are considered very serious.

CHAPTER III

THE ABUSE OF DEPENDENCE-PRODUCING SUBSTANCES AND REHABILITATION CENTRES ACT, 41 OF 1971

1. INTRODUCTION

The object of the legislature in enacting this Act was that there should be extremely severe punishment available to our courts.<sup>1)</sup>

The Act was brought into operation on December 6, 1971 by Proclamation in terms of section 65 of the Act.

From the cases which are discussed in this chapter it is obvious that some magistrates experienced difficulty in interpreting certain provisions of the Act, especially those relating to sentence.

Cases relating to contraventions of section 2(a) and 2 (b) relating to dagga only, will be discussed.

Section 2 (a) relates to dealing in a dependence - producing drug or any plant from which such dependence-producing drug can be manufactured. Section 2 (b) relates to possession or use of any dependence-producing drug or plant.

---

1 Shangase and Others 1972 2 SA 410 (NPD) at 414; Mamase and Others 1972 2 SA 765 (E) at 767. Kroutz en Andere 1972 2 SA 918(C) at 926H.

## 2. PENAL PROVISIONS

### 2.1 section 2 (a)

Originally the Act<sup>2)</sup> provided that for a contravention of this sub-section punishment would, in the case of a first conviction, be imprisonment for a period of not less than five years, but not exceeding fifteen years.

In the case of a second or subsequent conviction imprisonment would be for a period not less than ten years but not exceeding 25 years. Between December 6, 1971, when the Act came into operation and July 6, 1973, the date when the Act was amended as shown in the next paragraph, a portion of a sentence could be suspended. The passing of a sentence could not be postponed, nor could a convicted person be discharged with a caution or reprimand.<sup>3)</sup>

As from July 6, 1973<sup>4)</sup> no portion of a sentence for a contravention of the sub-section could be suspended.

In 1978,<sup>5)</sup> the Act was amended. The effect of the amendment was that, in the case of a first conviction imprisonment would be for a period not exceeding 25 years. In terms of the 1978 Act the provisions of section 297 of the Criminal Procedure Act 51 of 1977 apply to accused persons convicted of dealing in dagga. In other words,

---

2 section 2

3 Kroutz case at 921

4 in terms of the Abuse of dependence - Producing Substances and Rehabilitation Centres Amendment Act, 80 of 1973, section 2

5 in terms of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act, 76 of 1978.

sentences imposed on such persons may now be suspended. Passing of sentence may be postponed or a convicted person may be discharged with a caution or reprimand.

The Commission of Inquiry into the Penal System of the Republic of South Africa<sup>6)</sup> had recommended that the minimum sentences provided for contraventions of section 2 of the Act be repealed to make it possible for any court convicting an accused person for an offence, including dealing in dagga, to suspend any sentence imposed upon him.

Mr Justice Leon<sup>7)</sup> has this to say about mandatory sentences:

*"While inevitable difficulties can arise from differential sentencing in discretionary cases it is, I believe, generally better for the courts to have a discretion rather than have their hands tied by the legislature. After all, they are manned by case-hardened professionals with professional instincts, professional standards and professional discipline. The danger of not having such discretion is highlighted by the so-called 'Dagga Act' 1971 ..."*

## 2.2 Section 2(b)

Originally, a first offender<sup>8)</sup> would be sentenced to imprisonment for

---

6 known as the "Viljoen Commission" RP 78/1976 99 et seq.

7 Mr Justice R N Leon 'Opening Remarks' published in 'Criminal Justice in South Africa' edited by Olmesdahl, M C J and Steytler, N C 1983 at 1

8 means a person convicted for the first time of contravening the sub-section

a period not less than two years but not exceeding ten years.

In the case of a second or subsequent conviction imprisonment for a period not less than five years but not exceeding 15 years was provided. However the Act<sup>9)</sup> provided from its inception that whenever a court is bound to sentence a person convicted of being in possession of dagga and the court is satisfied that there are circumstances which justify the imposition of a lighter sentence than such prescribed punishment, it shall enter those circumstances on the record of the proceedings. On a first offender the court shall then impose a term of imprisonment not exceeding two years. On a second or subsequent conviction, the court shall impose a term of imprisonment not exceeding five years. Much will be said later about the provisions of section 7.

The 1978 Amendment Act<sup>10)</sup> affected the sub-section. In the case of a first conviction an accused would be sentenced to imprisonment for a period not exceeding ten years. In the case of a second or subsequent conviction he would be sentenced to imprisonment for a period not exceeding 15 years.

The effect of the 1978 amendment is that there is no longer a minimum sentence in respect of the two offences.

### 2.3 Penal jurisdiction of magistrates courts

The Act<sup>11)</sup> provides that a magistrate's court shall have jurisdiction

---

9 section 7

10 supra.

11 section 14

to impose any of the sentences referred to in 2.1 and 2.2 of this chapter.

### 3. POLICY

Reading the Abuse of Dependence-Producing Substances and Rehabilitation Centres Bill a second time<sup>12)</sup> the Minister of Social Welfare and Pensions said:

"... we have before the House today a measure which, from the very outset, has been described by the popular Press as 'the toughest anti-drug laws in the Western world' and I do not blame them for describing it in those terms. The pendulum has apparently swung from the one extreme to the other. Be that as it may, we are truly in earnest about stamping out with might and main this diabolical underminer and destroyer of Western man and his morals here in our country. ... the committee found that in our country the problem is to a large extent still concealed like an iceberg and should be viewed in a serious light. ... the committee found that this problem was already costing its evil shadow and that it could follow the same diabolical pattern as it did in other countries if the necessary measures were not taken in good time. For that reason the Government has decided to take strong action, and for that reason this Bill makes provision not only for minimum penalties in respect of certain offenders, but also imprisonment without the option of a fine, up to a maximum of 25 years in some cases.

*We still believe in moral standards and codes in this country, and even if other countries were to yield before this pressure, before the fine-sounding name of individual freedom, we are still not prepared to raise permissiveness to a virtue in South Africa".*

The Minister said that although some people believed that dagga was harmless, there were prominent medical men who firmly believed that it was habit-forming or dependence-producing and that it could lead to serious personality disturbances and behaviour which very often triggered violence.

The Minister's speech has been quoted at length because cases which are discussed hereunder show that some magistrates had considered the statement in imposing sentences.

#### 4. SOME OTHER VIEWS ON HOW DAGGA AFFECTS ITS USERS

The idea that severe sentences should be imposed on users or handlers of dagga stem from the belief that this substance is dangerous. Those who share in this belief are of the opinion that heavy sentences should be imposed on those who violate the provisions of section 2.

Du Pre, Le Roux and Botha<sup>13)</sup> say:

---

13 (initials not given) of the Institute for Social Development, University of Western Cape in their paper delivered at the South African Conference on dagga held in Durban on 14-15 September 1983 titled "*The incidence of dagga use in the Cape Peninsula*". at 2. (unpublished)

"However, to suspect that dagga can be very harmful indeed does not imply that one should be in favour of heavy criminal sanctions on the use of dagga. Our evidence very clearly shows that the chronic dagga smokers were generally the victims of their environment. It would be wrong to punish them for neglect of parental care and for the inability of the educational system to give them the necessary support where their parents had failed."

These authors conclude with the words

"prevention rather than punishment should be our motto".

Dr Teggin,<sup>14)</sup> a senior psychiatrist at the University of Cape Town, Valkenberg and Groote Schuur hospitals is of the opinion that dagga precipitates or exacerbates psychosis in vulnerable individuals and that in these cases specific behavioural and psychopathological changes are seen.

Some of the dangerous effects of dagga on its users are "*Estimation of distances become inaccurate. Attention span and the ability to remember things that have just happened is impaired.*"<sup>15)</sup> According to this author some of the effects can interfere dangerously with the ability to drive or to operate other complicated machinery. About individuals

---

14 (initials not given) in his paper "*Cannabis abuse by psychotic patients*" delivered at the South African Conference on dagga (supra) (unpublished)

15 this is the view of Schankula (initials not given) in his paper titled "*Dagga: Facts and Fiction*" delivered at the Durban Conference (supra) at 8 (unpublished).

who regularly use high doses of dagga over long periods the author says that they stop contributing to their families and the community. They seem to degenerate to a state where they no longer care about themselves and their surroundings. However, the author states that it was not clear whether such problems are the result of dagga use or simply occurred at the same time.

Even if it could be said with certainty that dagga is very harmful to human health, that fact, standing alone, would not justify severe sentences. Except in cases where minimum sentences were provided courts should still have exercised their discretion in assessing sentences.

*"There has been considerable disagreement among experts as to the effects of cannabis. On the one side of the continuum of opinion are those who regard cannabis as a harmless and impotent substance, or who see it in a positive light as a mind-expanding drug. Others regard it as a potentially dangerous drug that distorts and impairs perceptual and mental functioning." 16)*

## 5. GUIDELINES EXTRACTED FROM LEADING CASES

### 5.1 The Shangase case

The following guidelines have been extracted from the judgment of

---

16 Volbrecht, W M 'Die Daggaprobleem: Psigologiese, Fisiologiese en Maatskaplike Effekte' (Deel 1) (1977) 1 SACC 51

Harcourt, J in the Shangase case.<sup>17)</sup> The guidelines are relevant to the discussion of the provisions of both section 2(a) and 2(b) and are very useful to sentencers.

- (i) *"... Parliament regarded the abuse of dependence - producing drugs as a considerable evil and that there should be extremely severe (perhaps even harsh) punishments available to the courts to be used in appropriate cases of grave contraventions of the Act such as the machinations of large scale, especially organised operators."* <sup>18)</sup>
- (ii) By providing wide ranges of punishment between relevant maxima and minima the Legislature intended to provide courts with the discretion in regard to punishment.<sup>19)</sup>
- (iii) The wide range of punishment between relevant maxima and minima calls for the formulation of just standards to determine an appropriate punishment in each case.<sup>20)</sup>
- (iv) Courts have a discretion to suspend the operation of the prescribed sentences. The judge said: *"In this regard it must*

---

17 supra See infra in this chapter

18 at 414H Kroutz case at 926H

19 at 415F Kroutz case 926H

20 Ibid

also be borne in mind that the Legislature has not seen fit to exclude the expedient available to courts of suspending portion (and in some cases all) of the punishments under the Act."<sup>21)</sup> By "and in some cases all" the judge apparently meant cases where circumstances justifying the imposition of a lighter sentence were present in a contravention of section 2(b).

- (v) Although it cannot be doubted that the Legislature intended that the abuse of dependence-producing substances should be treated very severely, the Legislature did not intend that every offender should be treated very severely. Each case should be treated on its merits.<sup>22)</sup>
- (vi) Courts must not be influenced by the harsh penal provisions of the Act to impose harsh sentences especially in regard to first offenders. "This would tend to defeat the well accepted approach to punishment, namely, that it should desirably be such as to fit the crime and also, and probably equally importantly, the criminal in the surrounding circumstances of each case." The judge referred to the statement of Rumpff, J A in Zinn<sup>23)</sup>, namely, "What has to be considered is the triad consisting of the crime, the offender and the interests of society".<sup>24)</sup>

---

21 at 416G Kukarie en Andere 1972 2 SA 907(0) at 915 B-D

22 at 416. Cf Kroutz case 922-923

23 supra

24 at 540 G. See also Kumalo (footnote 67 Chapter I)

- (vii) The prohibitions of section 2 of the Act "refer to drugs which are, prima facie, of widely differing harmfulness, for example, heroin and prepared opium on the one hand compared with small plants of unprepared dagga on the other. If the court is satisfied that such prima facie difference significantly exists, then this would be a relevant fact in regard to punishment." 25)
- (viii) The court must regard and consider the cumulative effect of such of the factors as may be relevant. The judge went on to say that the factors "must also be considered individually to assess the qualitative cogency of each in the particular facts of the individual case. Furthermore, each of such variety of consideration must be effected in a spirit of perceptive understanding."<sup>26)</sup>
- (ix) Age is always a matter to be taken into account in view of its potential effect on maturity, either because of youth or senility or advanced age. In appropriate circumstances age should be regarded as a "circumstance" in terms of sec.7.<sup>27)</sup> The provisions of section 7 will be discussed later.
- (x) The Absence of previous convictions is a matter affecting

---

25 at 416 E-F

26 at 423 H

27 at 425 B-C

sentence. "Thus there is, in my judgment, no doubt but that the absence of any, or any directly relevant, previous convictions or a long period without convictions after relevant previous convictions should be taken into account in regard to the possible existence of "circumstances" in terms of sec.7. It is of course equally true that the presence of relevant previous convictions must be taken into account by being put into the scales in weighing up all the circumstances to decide whether or not a higher sentence should be imposed."<sup>28)</sup>

(xi) That the accused is responsible for his dependants, that he has been in regular employment and that his employer would be prepared to take him back if his term of imprisonment is not too long, and that, if his wife and family and his duty to them are likely to assist in his reformation, are relevant considerations for sentence. "In my judgment such factors are proper for consideration but will probably be of significant weight only when regarded cumulatively with other circumstances".<sup>29)</sup>

(xii) There is no general rule that before a court may wholly or partially suspend a sentence the court must be satisfied that special or exceptional circumstances exist. Such a rule would interfere with the discretion which the presiding

---

28 at 424 B-C

29 at 427 H - 428 A Kukarie case at 916 G-H

officer undoubtedly has in the matter of sentence. All circumstances which may persuade the court to impose a less severe sentence are relevant for consideration in this regard.<sup>30)</sup> The judge emphasized that there is also no general rule that a first offender should always be extended the advantage of a suspended sentence even in regard to relatively non serious offences.<sup>31)</sup> Such a rule would unduly interfere with the court's discretion. The judge said that "... what must always be weighed up is the benefit of the accused and of society in deciding what is a fair (or equitable) punishment ..."<sup>32)</sup>

- (xiii) The Act does not exclude other expedients of dealing with convicted juveniles.<sup>33)</sup> The expedients will be referred to later under 6.1 of this chapter.
- (xiv) The second or subsequent conviction referred to in sections 2(ii) and 2(iv) of the Act must be one under the provisions of the relevant paragraph of section 2. The section does not relate to previous dagga convictions under the repealed Act 13 of 1928 or any other law even if such are included in the generic description of offences under section 2 of the Act.<sup>34)</sup>

---

30 at 428 D-E. See also Joelson 1971 2 SA 135 (RAD) at 137

31 at 428 G. See also Victor 1970 1 SA 427 (AD)

32 at 428 G

33 at 429-30 See Kroutz case 924-926. Kukarie en Andere at 911-913

34 at 433 B-C Kroutz case 924G. Kukarie en Andere at 914

(xv) Section 48 of the Act provides that where the age of the accused is in doubt it must be estimated.<sup>35)</sup> Mr Justice Harcourt said: "Every effort should be made to obtain the best available evidence, for example, that of parents, guardians and relatives of accused persons who might qualify as juveniles and, in the unavoidable absence of such persons, medical evidence should be sought. The court should also note on the record all steps taken and evidence received to establish the age of the accused and a formal finding should be recorded."<sup>36)</sup>

## 5.2 The Kroutz case

In the Kroutz en Andere case the Full Bench answered questions raised by some provisions of the Act. The court said that most questions had already been answered by courts in the following cases: Shangase and Others<sup>37)</sup>, Kukarie en Andere<sup>38)</sup> and Nkosi en Andere<sup>39)</sup>.

Van Wyk, J (Banks, J and Van Heerden, J concurred) gave judgment. Some of the guidelines contained in the judgment relating to both dealing in and possession of dagga are the following:

---

35 see also section 383 of the repealed Criminal Procedure Act 56 of 1955 (now section 337 of the criminal Procedure Act)

36 at 433 G-H and 434 A. See Kroutz case at 926 A Kamfer 1969 4 SA 250 (C) at 252-253

37 supra

38 supra

39 1972 2 SA 753 (TPD)

- (i) Only a portion of the sentence may be suspended where the court is compelled to impose at least the minimum sentence.<sup>40)</sup>
- (ii) Where circumstances justifying the imposition of a lighter sentence are found in terms of section 7 of the Act, the sentence which is imposed may be suspended, not in terms of section 352(1)(a) bis but in terms of section 352(1)(b) of the repealed Criminal Procedure Act 56 of 1955.

Section 352 (1)(a) bis related to postponement of the passing of sentence for a period not exceeding three years and the release of the convicted person. The court could order that within that period the convicted person might be called upon by any magistrate to appear before him.

Section 352(1)(b) related to the passing of sentence but ordering the operation of the whole or any part of the sentence to be conditionally suspended for a period not exceeding three years.

These provisions are contained in sections 297(1)(a) and 297(1)(b), respectively, of the Criminal Procedure Act.

Van Wyk, J said: "*Ek kan dus ongelukkig nie saamstem met die stelling in S v Shangase and Others ... dat die uitstel*

van vonnis ingevolge die bepalings van art.352(1)(a) bis gemagtig is indien strafversagende omstandighede ingevolge art.7 gevind word nie."<sup>41)</sup>

- (iii) A contravention of section 2 in a prison must be regarded as an aggravating circumstance. Van Wyk, J said: "*Een van die redes waarom mense na die gevangenis gestuur word, is om hul los te maak van hul misdadige gewoontes en gebruike, en om hulle 'n geleentheid te gee om by verstryking van hul gevangenisstraf 'n nuwe begin te maak. Dit is wel bekend dat ernstige aanrandings dikwels in die gevangenis plaasvind as gevolg van die gebruik van dagga.*"<sup>42)</sup> A warning should be sounded that sentencers should consider this factor with other factors. Mitigating factors could be present even where the section has been contravened in prison.<sup>43)</sup>

- (iv) Any circumstance relating to the accused, the offence or the public interest can be considered circumstances justifying the imposition of a lighter sentence in terms of section 7.<sup>44)</sup>

- (v) It is clear that the Legislature intended that our courts should have unlimited discretion to impose any sentence of imprisonment on accused persons convicted of being in possession of dagga.<sup>45)</sup>

---

41 at 921-2

42 at 926 G Shangase case at 437 B

43 Shangase case at 437 A-C

44 at 926 D

45 at 926 H Shangase case at 415 F

- (vi) The heavy punishments laid down by the Act indicate the serious light in which the Legislature views the contraventions. This must be borne in mind throughout in the imposition of sentence.<sup>46)</sup>
- (vii) As regards dealing in dagga the heavy punishments prescribed must not be lightened by suspension to such a degree that the intention of the Legislature is foiled.<sup>47)</sup>
- (viii) A previous conviction under Act 13 of 1928 is not a previous conviction for the purposes of section 2 of the Act under discussion.<sup>48)</sup>
- (ix) It is desirable that juveniles with no previous convictions of whatever nature should, as far as possible, be kept out of prison.<sup>49)</sup>
- (x) The Act does not exclude other expedients of dealing with convicted juveniles.<sup>50)</sup> The expedients will be referred to later in this chapter.

---

46 at 926 H Shangase case at 414 H

47 at 927 A

48 at 924 G Shangase case at 433 B-C

49 at 924-926 Shangase case at 424

50 at 924-926. See Shangase case 429-430

## 6. SENTENCES

### 6.1 Cases under section 2(a) (Dealing in dagga)

In Nkosi and Others the full bench was concerned about 26 review matters relating to possession of, or dealing in dagga in contravention of section 2 of the Act. Marais, J said:

*"The policy and intention of the Act has been the subject of considerable public debates. With criticisms of that policy the courts are not concerned that their duty is to give effect to the provisions of the Act. At the same time, however, they must, insofar as they are able to do so within the limits prescribed by the Legislature, impose punishment on persons convicted of contraventions under the Act which are just." 51)*

The judges before whom the cases had first come on automatic review had asked magistrates concerned to furnish their reasons for the sentences. Some magistrates had referred to remarks made by the Minister of Social Welfare during the debates on the provisions of the Act in Parliament, in justification of the sentences they had imposed. The Court remarked that it is not permissible for a court in applying a statute, to have regard to statements made in the course of debates in Parliament and that the meaning of the provisions, and the intention of the legislature must be found from the terms of the Act itself.

---

51 supra at 755

Some magistrates, in their reasons for sentences, had stated that to suspend a substantial portion of the sentence prescribed would have the effect of defeating the intention of the legislature. In the view of the reviewing judges the suggestion by the magistrates was unfounded as there was nothing in the Act to suggest that the accepted principles relating to suspension of sentences should not be applied in cases which arise under the Act. The court said that within the limits prescribed by section 2 of the Act, judicial officers have an unimpaired discretion in the fixing of a proper and just punishment with due regard to all the relevant details and circumstances connected with the crime and the person convicted.

The Court correctly said that such discretion is necessary because there may be considerable differences in the seriousness of the offence.

In Shangase,<sup>52)</sup> the accused, a young man of 22 years of age had been convicted by a magistrate in that he had cultivated 56 plants of dagga. The accused had a previous conviction of possession of dagga in 1971 for which he had been fined R5 or in default of payment, to undergo 14 days' imprisonment. He had, in the present case, been sentenced to imprisonment for five years.

On review it was submitted that the sentence was glaringly inappropriate in view of a relatively modest number of dagga plants. The Attorney-general contended that there should have been a suspension of the operation of "*a not insubstantial portion of the imposed sentence*".

---

52 supra at 436

Bearing in mind the age of the accused, the quantity of dagga in question and all the circumstances of the case, but bearing in mind the previous conviction for dagga, the court considered it appropriate and just to order that the operation of three years of the imposed sentence should be conditionally suspended for three years.

In Malebo en n Ander,<sup>53)</sup> a Black female aged 25 years had been found in possession of 27 zolls of dagga weighing 150 grammes. The other accused had also been convicted of dealing in 15 zolls of dagga weighing 110 grammes.

Both accused had no previous convictions. They had admitted that they had possessed the dagga for sale. Each accused had been sentenced to imprisonment for five years in the magistrate's court.

From the reasons for sentence it appeared that the magistrate had considered the provisions of section 7 of the Act which provides for a lighter sentence if there are circumstances which justify it. The magistrate had misdirected himself as this section applies only when an accused has been convicted of contravening section 2(b) or (c) of the Act.

De Villiers, A J P, was of the opinion that the sentences were severe and was further of the opinion that in terms of section 352 of the Criminal Procedure Act 56 of 1955 (now section 297 of the Criminal Procedure Act 51 of 1977) portions of the sentences could be suspended.

The Acting Judge President found that there were no aggravating circumstances in both cases. A police witness had testified at the trial that a zoll of dagga would cost 10 cents. The profit which the accused would derive would therefore be minimal.

The court ordered that in each case three years of the five years be conditionally suspended for three years.

In Mateus<sup>54)</sup> the appellant, a married man aged 53 years with ten children had dealt in 2090 grammes of dagga. The magistrate had imposed eight years' imprisonment. The appellant's vehicle in which the dagga had been conveyed had been declared forfeit to the State. The appellant had previous convictions of less serious offences. The previous convictions were more than ten years old. In terms of section 303 ter (1) and the Fifth Schedule to the 1956 Criminal Procedure Act the appellant had been treated as a first offender because he had had a clean period of more than ten years. In his reasons for sentence the magistrate had said:

*"n Hewige afkeur bestaan teen die gebruik van afhanklikheidsvormende stowwe by die gemeenskap en hierdie afsku vind uiting in die buitengewoon swaar strawwe wat deur die Wetgewer vir die gebruik en verspreiding van hierdie stowwe in hierdie gemeenskap voorgeskryf is."*

On appeal, although Badenhorst, J P was not of the opinion that the magistrate had misdirected himself, he felt that there was a disparity between the sentence imposed by the magistrate and the one he would have imposed, and that, as such, the sentence should be interfered with. The appeal against sentence succeeded but the one against forfeiture of the vehicle failed. The sentence was altered to one of five years' imprisonment of which two years were conditionally suspended for five years.

The sentence imposed by the magistrate was unduly severe. The magistrate seems to have considered principles applicable to tariff sentences not those which govern the selection of individualised measures. Individualised measures ought to have been applied to a married 53 year-old first offender with ten children and whose vehicle was to declared forfeit to the State.

In Mofokeng<sup>55)</sup> the accused had dealt in 368,2 grammes of dagga. A magistrate had sentenced the accused to imprisonment for five years of which four years had been conditionally suspended for three years. On appeal the sentence was confirmed. The magistrate had exercised his discretion judicially. There is no indication that the sentence had been adversely affected by policy considerations.

In Harvey<sup>56)</sup> the accused had been sentenced to five years' imprisonment. While he was 19 years old he had, together with another youth aged

---

55 1973 2 SA 89 (OPD)

56 1977 2 SA 185 (OPD)

20 years, dealt in dagga. He had two previous convictions of being in possession of dagga in contravention of section 2 (b) of the Act. On May 17, 1973 he had been sentenced to four months' imprisonment which was conditionally suspended for three years. On April 2, 1975 he had been sentenced to five cuts with a light cane. He had another previous conviction of malicious injury to property for which he had been cautioned and discharged.

On appeal M T Steyn, J said that where an accused, at the time of the commission of an offence, is under the age of 21 years, he can be dealt with in terms of section 342 or 345 of the Criminal Procedure Act 56 of 1955 (now sections 290 and 294, respectively, of the Criminal Procedure Act 51 of 1977). A juvenile accused could be dealt with in terms of section 159 of Act 56 of 1955 (now section 254 of the Criminal Procedure Act).

Section 290 relates to dealing with a convicted juvenile (ordering that he be placed under the supervision of a probation officer or that he be placed in custody of any suitable person or that he be sent to reform school) and section 294 relates to sentencing a convicted male juvenile to moderate correction of whipping. Section 254 (section 159 of the repealed Criminal Procedure Act) provides that if it appears to the court during the trial upon any charge of any accused under the age of 18 years that he is a child in need of care, it may stop the proceedings and order that the accused be referred to a children's court. If the order is made after conviction, the verdict shall be of no force in relation to the juvenile and shall be deemed not to have been returned. The judge stated therefore

that the sentence in such a case is discretionary and that the personal circumstances of such a convicted person and the manner in which he had committed the offence are highly relevant in determining an appropriate sentence. The sentence was set aside. The court substituted it by one of ten cuts with a cane. The magistrate's main consideration in imposing sentence was that the offence was a serious one and had thus failed to exercise his discretion properly.

Ten cuts with a light cane seems to be a severe sentence. There is presently great conflict of opinion on the subject of corporal punishment. While some people believe that this form of punishment should be abolished because it *"is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being."*<sup>57)</sup>

Didcott, J said the following about whipping in terms of section 294 of the Criminal Procedure Act: *"The punishment is familiar to teenagers who have committed crimes of some seriousness involving violence or dishonesty, or who have a history of delinquency demanding stern treatment after the indulgence shown them in the past. It is then an alternative to sending to a reform school or to goal, and a more lenient one"*.<sup>58)</sup> Mr Justice Didcott said that although juvenile whipping is less severe than whipping meted out to an adult, one should not underestimate either the physical pain or the psychological trauma a police officer can inflict with a light cane.<sup>59)</sup>

57 per Fannin, J in Kumalo and Others 1965 4 SA 565 (N) at 574 G-H. See also Van S D'Oliveira, J A: *"Corporal punishment as an alternative to, or in Part-Commutation of, a sentence of imprisonment"* published in (1983) 18 *'The Magistrate/Die Landdros'* at 191 Tanbiga 1965 1 SA 257 (SR) at 258 E-G

58 in M 1982 (1) SA 240 (N) at 245

59 at 245 A

Botha, J A expressed himself as follows in connection with determining an appropriate sentence to be imposed on a juvenile: "*In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile.*

*The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases ...".* 60)

In the Harvey case the magistrate had called for a probation officer's report after conviction. According to the report the appellant had, since leaving school at the age of 16 years, been employed at about 12 places and that during certain periods he had been unemployed. He had admitted that he had started smoking dagga when he was 17 years of age but he had denied that he had been addicted to it. The probation officer said that the attitude of the Director of rehabilitation services was that "*... persone met "kriminele rekords" nie in rehabilitasiesentra opgeneem word nie*".<sup>61)</sup> She was of the opinion that in the circumstances of the appellant a sentence of imprisonment

---

60 Jansen and Another 1975 1 SA 425 AD at 427H-428A. See also Ruiter en h Ander Beyers en Andere Louw en h Ander 1975 3 SA 526(C)

61 at 187 F-G

would be the most appropriate. She was, however, not willing to say that the appellant was not a suitable case for treatment in such an institution. The appellant had contested some of the probation officer's findings.

M T Steyn, J found the following mitigating factors present; namely, youthfulness of the appellant and the fact that the appellant had played a lesser role in the commission of the offence had not received the magistrate's serious consideration. The judge said that the four months' imprisonment which had been conditionally suspended on May 17, 1973 could be put into operation. However, the judge made an order in terms of section 352(1)(a) and (b) of the repealed Criminal Procedure Act further suspending the operation of the sentence for three years as from May 17, 1976 subject to two conditions, one of which was that during the period of the further suspension the appellant be subject to the supervision and control of a probation officer as defined in section 1 of the Act under discussion. This order seems to have been appropriate in the circumstances and was likely to serve the interests of society as well as those of the appellant.

The question is whether the appellant and society benefitted from the sentence of ten cuts with a light cane, especially because the sentence of five cuts with a light cane imposed the previous year had not deterred the appellant from committing an offence involving dagga, nor had the suspended imprisonment for four months. In Tanbiga<sup>62)</sup>

---

62 supra

the accused, a first offender, was also 19 years of age. He had been convicted by a magistrate of grave indecent assault on a respectable married woman of about 40 years of age and mother of two children. The magistrate had sentenced the accused to six months' imprisonment with hard labour and four cuts with a cane.

On review, Young, J said that the offence was a serious one as it revealed a disgusting disregard for the feelings of the complainant. The judge said that short-term imprisonment was sometimes necessary but it should not be resorted to lightly as it exposed the offender to contamination and little opportunity for constructive training. The judge went on to say: "*To my mind the case is one in which a short term of imprisonment should have been avoided. It is a case where the accused requires a short sharp lesson.*"<sup>63)</sup> The conviction was confirmed but the sentence was set aside and was substituted by one of four cuts with a cane. The judgment is to be welcomed.

In my opinion the "*short sharp lesson*" of ten cuts with a light cane in the Harvey case following on the one of five cuts imposed the previous year, was, with respect, severe. It does not seem that the appellant and society benefitted from it. As the judge was of the opinion that the appellant might benefit from being under the supervision and control of a probation officer, he could as well have dealt with the appellant in terms of section 342 of the repealed Criminal Procedure Act (now section 290). "*Prevention rather than punishment should be our motto.*"<sup>64)</sup>

---

63 at 258 H

64 footnote 13 of this chapter

The case of Pledger<sup>65)</sup> also illustrates a misdirection. A regional magistrate had sentenced the accused to imprisonment for five years for dealing in dagga. The accused had appealed to the Provincial Division. He had turned 21 years of age between the time of the commission of the offence and his conviction. On appeal the sentence was set aside. In terms of the then section 345 of the Criminal Procedure Act 56 of 1955 (now section 294 of Act 51 of 1977), the court substituted it by that of moderate correction of a whipping of five cuts with a light cane. Cloete, A J P stated that the court must look at the age of the accused as at the date of commission of the offence in exercising its discretion to sentence a person not exceeding 21 years of age.

The case of Khulu<sup>66)</sup> came before the Provincial Division as an automatic review case. The accused, a young Black who was unrepresented had been convicted by a magistrate of dealing in dagga. The accused had one related previous conviction. The magistrate had sentenced him to imprisonment for ten years.

The record reflects that after the accused had been convicted, before he had been sentenced, he had been taken to a district surgeon for assessment of his age. According to the report by the district surgeon the accused was not less than 18 years of age.

The accused had contested the report by the district surgeon. The latter had, in his evidence, adhered to his conclusion that the accused was at least 18 years old. The accused had replied as follows:

---

65 1975 2 SA 244 (E)

66 1975 2 SA 518 (NPD)

*"My parents told me I am 16 years old. If the doctor says I am 18 I cannot dispute it further."*

Without any further enquiry into the age of the accused, the magistrate had sentenced him.

Kumleben, J (Shearer, J concurring) confirmed the conviction but set aside the sentence and referred the case back to the magistrate to obtain a report by a probation officer and to make such further enquiry into the age of the accused as may be reasonably practicable and thereafter to sentence the accused afresh.

Even if it had been proved that the accused was 18 years old, the magistrate would still have misdirected himself as regards sentence. There were alternatives<sup>67)</sup> to imprisonment available to the court. Sentencing an accused person of this age to imprisonment for ten years, despite the available alternatives, shows a serious lack of the sense of justice.

The order by the reviewing judges is welcomed. Legislative policy was, obviously, misinterpreted by the magistrate.

In Setnoboko<sup>68)</sup> the accused, had been sentenced to imprisonment for five years of which three years had been conditionally suspended for five years. The accused was a 27 year old first offender. He had dealt in 300 grams of dagga.

---

67 such as those provided for by the then sections 342 and 345 of the then Criminal Procedure Act 56 of 1955 mentioned earlier

68 1981 3 SA 553 (OPD)

On review, the magistrate had been requested to furnish his reasons for sentence. In his reasons for sentence the magistrate had stated:

"... omdat daar versagtende omstandighede teenwoordig was, het die hoof besluit om drie jaar gevangenisstraf vir 'n tydperk op te skort. 'n Verdere doel wat die opskorting van 'n deel van die vonnis betref, is om 'n swaard oor die beskuldigde se kop te hang om te probeer verhoed dat hy weer dieslefde misdaad in die toekoms pleeg".69)

When asked why he had decided to suspend three years for five years the magistrate had replied as follows:

"waarin beskuldigde hom sal kan bewys en die drie jaar gevangenisstraf wat oor sy kop hang moet dan nie alleen vir hom beskerm nie maar ook die gemeenskap teen die gebruik van die euwel wat beskuldigde aan hulle verskaf."70)

Flemming, J said that in the determination of what is an appropriate sentence in a particular case and whether a portion of the sentence should be suspended, it would be wrong to look at part of the sentence only as though the suspended portion does not have to be served. The judge said that of the suspended portion it can only be said that it does not necessarily have to be served, it remains part of the sentence of the court and may possibly be served.

---

69 at 555

70 at 555

The need for careful consideration of a sentence, which, as a whole is appropriate, cannot be relaxed merely because there is a possibility that the suspended portion of the sentence will eventually not have any real effect in that it will not have to be served.

The court reduced the sentence to one of 20 months' imprisonment, of which eight months were conditionally suspended for three years. (The Amendment Act<sup>71)</sup> had got rid of the minimum period of imprisonment.)

In Mateisi<sup>72)</sup> the accused had dealt in 2,19 kilogrammes of dagga. The accused was a first offender. The magistrate had sentenced him to imprisonment for four years. On review the magistrate had been requested to furnish his reasons for the sentence. The magistrate, in his reasons, had referred, among others, to a reported case where Holmes, J A had said:

*"... no doubt, too ... a supplier for gain may in general be regarded as a vicious person who needs to be put down, for in the drug traffic he is an indispensable evil link in the chain leading to the consumer."*<sup>73)</sup>

The magistrate had said that mitigating factors were that the accused who was 34 years of age was a first offender. The accused was married and had three children. He was employed and earned R3,85 per day.

---

71 section 1 of the 1978 Amendment Act

72 1981 2 SA 368 (OPD)

73 Gibson 1974 4 SA 478 (AD) at 481 H

As aggravating factors the magistrate had considered "*die groot hoeveelheid dagga en die baie onskuldige mense wat daardeur benadeel kan word*". Viljoen A J, said that the amendment of sections 2 and 2 A of Act 41 of 1971 by Act 76 of 1978 reflected an important change of principle by the legislature in respect of its attitude towards dagga. The latter Act had abolished the minimum sentence.

The judge went on to say that, although imprisonment would be applicable to a first offender where a large amount of dagga is involved, there were cases where the interests of society and the interests of a particular offender would be served just as well if part of the sentence is conditionally suspended.

The court accordingly altered the sentence to one of imprisonment for four years of which two years were conditionally suspended for three years. What a striking disparity!

In Batshise,<sup>74)</sup> the quantity of dagga was 11,98 kilograms. The appellant had been sentenced to imprisonment for six years of which four years were conditionally suspended for five years. His interests in a 1974 model Chevrolet motor vehicle had been declared forfeit to the State. Evidence had revealed that the appellant had been lured into acting as an intermediary between the seller of the dagga and the buyer thereof. The appellant had played no part in the conclusion of the agreement between the seller and the buyer. He had been offered a reward for R40 for the conveyance of the dagga. The appellant was 51 years of age and he was a first offender. He was a truck

driver and earned R55 per week.

In reasons for sentence the magistrate had stated that his court had dealt with "... *n baie ernstige misdaad*". Wessels, J A was of the opinion that the magistrate had over-emphasized the seriousness of the offence and the interests of society and had thus not attached weight to the personal circumstances of the accused. The appellant had unsuccessfully appealed to the Provincial Division. The Appellate Division altered the sentence to one of two years' imprisonment which was conditionally suspended for five years. Botha, A J A dissenting, was of the opinion that a suitable sentence would have been one of imprisonment for two years of which one year would be conditionally suspended.

Although the 1978 Amendment Act came into operation after thousands of accused persons had been sentenced to the mandatory minimum term of imprisonment for five years despite the presence of mitigating factors, it is to be welcomed.

Although it had been suggested to the magistrate in Jantjies<sup>75)</sup> that the accused be dealt with in terms of the then section 342<sup>76)</sup> of the repealed Criminal Procedure Act, as she had been under the age of 21 years at the time of the commission of the offence, the magistrate had sentenced her to five years' imprisonment. According to the charge sheet the accused was 18 years old. She had no previous convictions. In his reasons for the sentence which contained numerous

---

75 1978 1 SA 1048 (E)

76 now section 290 of the present Criminal Procedure Act

misdirections, the magistrate had among others, stated that "*the accused is a large well developed young woman*", that "*by sending an accused such as this accused to jail other youngsters will be kept from coming into contact with the sort of people that might lead them astray*" and that the gaols were not the only places where undesirable people were to be found. The magistrate had stated that had the accused been older he would have imposed a more severe sentence. The attitude of the magistrate suggests that he had misinterpreted legislative policy and had thus considered principles applicable to tariff sentences.

The reviewing judge who had read the magistrate's reasons with some amazement, held that the magistrate had misdirected himself and that he had failed properly to consider all the circumstances of the case and that, before sentencing the accused to imprisonment for such a long period he should have called for a social welfare report. The sentence was set aside and the matter was referred back to the magistrate to obtain a social welfare report before sentence would be imposed.

The record shows that ten other persons had been involved in the dagga, quantity of which is not indicated. The magistrate had stated that "*If she had been older a more severe sentence would have been passed.*" It is difficult to conceive what would have been a "*more serious sentence*" on a first offender.

That portion of the sentence is conditionally suspended does not justify a severe sentence.<sup>77)</sup> In this case the appellant, a Coloured

---

77 Allart 1984 2 SA 722 (TPD)

man aged 26 years, had one unrelated previous conviction. He had given a small quantity of dagga described as "n vinger dagga", which he had had in his possession, to a trap. The appellant had not demanded payment for the dagga. Apparently he had given the dagga as a present to the trap who had told him that he was on his way to the border and that he needed dagga. The trap had, after walking away a few paces, returned to the appellant and had inserted R2 into the appellant's pocket. The appellant had later been arrested. No other dagga had been found in the possession of the appellant. The appellant was unmarried but maintained his mother and four brothers and sisters. The magistrate had sentenced him to five years' imprisonment of which four years were conditionally suspended.

In his reasons for sentence the magistrate had stated that he had noted that the appellant had dealt in one cigarette of dagga but that the small quantity of dagga was not per se a mitigating factor. According to the magistrate's experience a dealer in dagga was careful not to be in possession of a large quantity of dagga but carried a quantity which the consumer would like to buy. Van Dijkhorst, J was of the opinion that the magistrate had seriously misdirected himself. The judge went on to say that the appellant was not a dealer in dagga in the usual sense and that the magistrate had not considered the circumstances in which the offence had been committed. The judge said that in the light of what has been said, the sentence imposed by the magistrate was inappropriate. The fact that four years of the sentence were conditionally suspended did not change the standpoint. The appeal against sentence was upheld. The sentence was set aside and was substituted for by one of imprisonment for one

year, conditionally suspended for four years. The criticism by the Appeal court is to be welcomed. It is surprising to note that, although the Supreme Court gave guidance to magistrates as early as 1972,<sup>78)</sup> they still ignore principles of sentencing.

## 6.2 Statistics

A sample of 30 sentences imposed by the Lower Umfolozi (Empangeni) District Court was obtained. The period covered is January to September 1984. Many accused persons who were originally charged with dealing in dagga, alternatively, being in possession of dagga, were convicted of the latter. The sentences were imposed by three magistrates attached to this court. The source of information was the court records. It was, however, not possible to establish from the records the circumstances in which dealing in dagga had taken place. Evidence was recorded mechanically. In most cases evidence had not been transcribed. The reviewable sentences had been confirmed on review.

Judging from the available factors, namely, the record of the accused, their ages, and the quantity of dagga, the sentences seem to be in accordance with justice. There are no indications that government policy considerations adversely influenced the sentences. The following table shows the sentences.

---

78 Shangase and Others, Nkosi and Others, Mamase and Others, Kroutz en Andere and Kukarie en Andere cases

RACE	AGE OF THE ACCUSED	SEX	QUANTITY OF DAGGA	PREVIOUS CONVICTIONS (if any)	SENTENCE
Black	22	m	less than 115 grams	nil	18 months imprisonment which 9 months are conditionally suspended
Black	48	m	more than 115 grams	nil	2 years' imprisonment of which 1 year is conditionally suspended
Black	24	m	less than 115 grams	nil	8 months' imprisonment conditionally suspended
Black	42	m	10,800kg	3 unrelated	5 years' imprisonment of which 2 years are conditionally suspended
Coloured	27	m	less than 115 grams	nil	2 years' imprisonment conditionally suspended
Black	22	m	423 grams	nil	18 months conditionally suspended
Black	37	f	less than 115 grams	nil	12 months' imprisonment of which 6 months are conditionally suspended
Black	28	m	less than 115 grams	nil	18 months' imprisonment of which 9 months are conditionally suspended
Black	52	f	less than 115 grams	nil	18 months' imprisonment conditionally suspended
Black	21	m	less than 115 grams	nil	18 months' imprisonment conditionally suspended
Black	20	m	less than 115 grams	nil	1 year imprisonment of which 6 months are conditionally suspended
Black	35	f	more than 115 grams	nil	2 years' imprisonment of which 1 year is conditionally suspended
Black	25	f	more than 115 grams	nil	2 years' imprisonment of which 1 year is conditionally suspended
Black	46	m	300 grams	nil	2 years of which 18 months are suspended
Black	31	m	less than 115 grams	nil	18 months imprisonment of which 9 months are conditionally suspended
Black	30	f	less than 115 grams	nil	18 months imprisonment of which 9 months are conditionally suspended
Black	39	m	less than 115 grams	nil	2 years imprisonment of which 1 year is conditionally suspended
Black	35	f	less than 115 grams	nil	12 months' imprisonment of which 6 months are conditionally suspended

RACE	AGE OF THE ACCUSED	SEX	QUANTITY OF DAGGA	PREVIOUS CONVICTIONS (if any)	SENTENCE
Black	38	f	60 grams	nil	2 years of which 1 year is conditionally suspended
Black	28	m	less than 115 grams	nil	12 months' imprisonment of which 6 months are conditionally suspended
Black	40	f	less than 115 grams	nil	18 months' imprisonment of which 9 months are conditionally suspended
Black	22	f	less than 115 grams	nil	2 year's imprisonment of which 1 year is conditionally suspended
Black	40	f	less than 115 grams	nil	18 months' imprisonment of which 12 months are suspended
Black	48	m	less than 115 grams	nil	18 months' imprisonment of which 9 months are suspended
Black	38	f	less than 115 grams	nil	18 months' imprisonment of which 9 months are suspended
Black	31	m	less than 115 grams	nil	9 months imprisonment
Black	23	f	more than 115 grams	nil	2 years' imprisonment of which 1 year is conditionally suspended
Black	42	m	less than 115 grams	nil	9 months' imprisonment
Black	32	f	less than 115 grams	nil	12 months' imprisonment of which 6 months are conditionally suspended
Black	47	m	less than 115 grams	2 unrelated	9 months' imprisonment

TABLE

1		2		3	4	
QUANTITY OF DAGGA		AGE OF ACCUSED		PREVIOUS CONVICTIONS FOR CONTRAVENING SECTION 2	SEX	
NUMBER			NUMBER		MALE	FEMALE
LESS THAN 115 GRAMS	MORE THAN 115 GRAMS					
4	1	20-22 years	5	Nil	4	1
6	2	23-30 years	7	Nil	4	3
9	1	31-40	11	Nil	3	8
2	3	41-50	6	Nil	6	Nil
1	1	51+	1	Nil	Nil	1
—	—		—		—	—
<u>22</u>	<u>8</u>		<u>30</u>		<u>17</u>	<u>13</u>

TABLE (continued)

SENTENCES				
12 months	13 - 18 months	19 - 24 months	3 - 4 years	5 years
1	3	1	Nil	Nil
3	2	2	Nil	Nil
4	3	4	Nil	Nil
2	1	2	Nil	1
Nil	1	Nil	Nil	Nil
—	—	—	—	—
<u>10</u>	<u>10</u>	<u>9</u>	<u>0</u>	<u>1</u>

CE

one of the 30 accused had unrelated previous convictions.

the terms of imprisonment of 12 months and above were either wholly suspended or portions of at least half of each sentence was suspended.

three terms of nine months' imprisonment were not suspended. The accused who sentenced to five years' imprisonment had dealt in dagga weighing 10,800 kilograms.

### 6.3 Section 2(b) (Being in possession of dagga)

#### 6.3.1 Introduction

A study of reported cases shows that immediately after the Act came into operation magistrates experienced difficulty in applying the provisions of this sub-section.

#### 6.3.2 Cases

In Shangase and Others<sup>79)</sup> 21 cases had been submitted for review before the Natal Provincial Division. There was one appeal case. According to Harcourt, J magistrates in Natal had experienced difficulties of interpretation of certain provisions of the Act which had been brought into operation on 6 December 1971. To improve the situation and in an endeavour to assist magistrates in Natal in understanding the application of the manifestly difficult task, the Judge-President had directed a special sitting of a Full Court to consider a number of cases which presented different problems. The courts would give a detailed and comprehensive decision which might serve as a guide in other review cases and in cases to be tried by magistrates in Natal.

The Chief Magistrate of Durban had arranged for the magistrates of his district to provide a statement of their views. These magistrates "*were widely experienced*".<sup>80)</sup> In their memoranda the magistrates

---

79 supra.

80 at 412B

had stressed the objectives of the Minister of Social Welfare in regard to the nature of the offences and penalties in the Act. The magistrates had quoted from Hansard where the objectives of the Minister were contained to the effect that it was intended to deal "mercilessly" with persons who wittingly evaded or contravened the Act.<sup>81)</sup> Mr Justice Harcourt remarked that it was a well-established principle that in interpreting an Act of Parliament no regard can be made by a court to debates on the subject-matter being considered by the legislature before the act of legislation is determined upon.

As regards sentence the Judge referred to the words of Rumpff, J A<sup>82)</sup> to the effect that "*What has to be considered is the triad consisting of the crime, the offender and the interests of society.*" As regards "*circumstances justifying the imposition of a lighter sentence*" referred to in the Act,<sup>83)</sup> Harcourt, J, after referring to several authorities, stated that the following factors appeared to him to fall within the definition of the "*circumstances*":<sup>84)</sup>

"(i)            the age of the accused and his condition particularly in regard to his cultural, physical, mental and emotional states and any established immaturity whether attributable to such states, lack of sophistication or education or the like;

(ii)           the factual context in which the crime was committed and the motive of the accused, for example, the absence of premeditation, any degree of temptation to which he was

---

81 at 414

82 in Zinn (supra) Chapter I footnote 67

83 section 7 as will be discussed hereunder

84 at 423

subjected, the absence of any tendency for his conduct to deprave others;

- (iii) the limited quantity and nature of the dependence-producing substance in his possession including the fact that dagga is almost certainly not as dangerous and harmful as some of the substances with which it is coupled in the relevant penal provisions of the Act;
- (iv) the absence of previous convictions or, if any exist, the nature, number and dates thereof and the time which elapsed since the last relevant such conviction;
- (v) whether or not the accused is in regular employment and has dependants;
- (vi) the local conditions and incidence of the specific crime in the area in question as indicating that severe penalties are not particularly called for;
- (vii) any pressure exerted on the accused by persons in authority over, or having influence upon, the accused, for example, orders (or perhaps even requests) from an employer, parent, husband or the like as well as duress or intimidation;
- (viii) as a limited and transient consideration, the question whether or not the offence had been committed so soon after the coming into force of the Act that the particular accused was unlikely to have been aware of the new and more drastic approach to the whole question of dagga;
- (ix) the probable effect upon the accused of a long or substantial period of imprisonment;

(x) any other factor, bearing on the commission of the crime, which reduces the moral blameworthiness of the accused".

The judge emphasized that courts should regard and consider the cumulative effect of these factors as may be relevant. Kennedy, J and Muller, J concurred.

The judges then applied the principles to the individual facts of the various cases which were being considered on review. Some of these cases will be discussed to show the effect of policy considerations on the sentences.

Mzini<sup>85)</sup>. In this case the accused, a 22 year-old man had been convicted of possessing 100 grams of dagga in a residential compound. He had a clean record. A magistrate had sentenced him to imprisonment for 12 months of which six months were conditionally suspended for three years. The magistrate had found that "*circumstances*" in terms of section 7 existed but he had regarded 100 grams as a "*large quantity*" of dagga.

The court ordered that the operation of all except three months thereof should be suspended on the terms imposed by the magistrate. The court had properly taken into account the age of the accused, the novelty of the very severe impact of the Act and that the quantity of dagga was not particularly large.

Mhlongo.<sup>86)</sup> The accused in this case had possessed approximately

---

85 at 436

86 at 436

2 grams of dagga in a gaol where he was detained. The accused was 24 years of age and had two previous convictions for assault with intent to do greivous bodily harm. The magistrate had found that "*circumstances*" existed and he had sentenced the accused to imprisonment for six months.

It was submitted that it would be appropriate to suspend portion of this sentence. The Attorney-general opposed the submission stating that the offence was aggravated by being an instance of smuggling dagga into gaol and that the accused had two relatively serious previous convictions. The court was not persuaded that any grounds existed for interference with the discretionary punishment imposed by the magistrate. The sentence was confirmed. The sentence seems appropriate.<sup>87)</sup>

Mthembu.<sup>88)</sup> The accused, a 25 year-old man had possessed one cigarette of dagga weighing approximately 1.77 grams. He had possessed the dagga while walking on a main road. He had three previous convictions, namely, one for possession of a dangerous weapon and two counts of housebreaking with intent to steal and theft. A magistrate had sentenced the accused to imprisonment for two years of which 21 months were conditionally suspended. In his reasons for sentence the magistrate had stated that he did not regard the small quantity of dagga involved as a potential "*circumstance*".

On behalf of the accused it was argued that the magistrate should have found that circumstances existed which justified the imposition

---

87 see Kroutz case footnotes 41 and 42 of this chapter

88 at 437 C

of a lighter sentence and that part of such sentence should have been suspended. The court was of the opinion that it could not be said that the magistrate had misdirected himself. The sentence was confirmed.

The previous convictions of the accused did not relate to dagga. The accused had possessed a small quantity of dagga. The offence had been committed soon after the coming into force of the Act. The accused was unlikely to have been aware of the new and more drastic approach to the question of dagga. The accused had possessed a very small quantity of dagga. These factors considered cumulatively should have led the magistrate to the conclusion that circumstances existed. Justice would then have been done if the accused had been sentenced to say, imprisonment for six months of which three months were conditionally suspended. The sentence imposed by the magistrate and confirmed on review cannot, with respect, be justified by the fact that a greater part of it was suspended. It has been said in this work that a suspended sentence remains part of the sentence of the court and may possibly be served.

In Mpanza<sup>89)</sup> the accused had possessed half a cigarette of dagga mixed with tobacco. The accused was a youth of 19 years and had no previous convictions. The magistrate had sentenced him to two years' imprisonment of which 18 months were conditionally suspended.

The reviewing court was of the opinion that this was a case in which the age of the accused should have been carefully investigated and fixed and that, depending on such fixed age, the court should have

treated him as a juvenile. The court was further of the opinion that it would be undesirable then to impose a whipping, as the accused had already been in gaol for just over one month. The sentence was altered to that of three months' imprisonment, the whole sentence conditionally suspended for two years. The substantial differences between the two sentences is a reflection of lack of direction on the part of the magistrate.

The case of Moletshe<sup>90)</sup> also reflects a misdirection. In casu the accused had possessed one cigarette of dagga. He had no previous convictions whatsoever. He was 22 years of age. The magistrate had sentenced him to two years' imprisonment of which 18 months were conditionally suspended.

On review it was submitted on behalf of the accused that the small quantity of dagga, absence of previous convictions and the age of the accused should have been considered by the court a quo as circumstances justifying the imposition of a lighter sentence. The Attorney-general was also of the same opinion. The court was of the opinion that an appropriate sentence was one of three months' imprisonment, the whole sentence conditionally suspended. The court ordered the immediate release of the accused from prison. The magistrate had ignored principles of sentencing.

That the policy of the legislature was the main consideration by magistrates before imposing sentence is also demonstrated in the case of Linda.<sup>91)</sup> The

---

90 at 439 D

91 at 439 H

accused, aged about 52 years, had possessed one cigarette of dagga. He had no previous convictions of any sort and had, in mitigation, pleaded that he was an elderly person. The magistrate had, however, sentenced him to imprisonment for two years of which 18 months were suspended on certain conditions.

On review the court was of the opinion that "*circumstances*" were present and it altered the sentence to that of three months' imprisonment conditionally suspended for three years. The court ordered the immediate release of the accused. The decision of the reviewing court is to be welcomed. There is an alarming disparity between the two sentences.

In Magubane<sup>92)</sup> the magistrate had not explained the nature and the effects of section 7 relating to "*circumstances*" to the accused. The 21 year-old accused had possessed one ounce of dagga. He had three previous convictions for attempted robbery, theft and being an idle person, respectively.

On review the sentence of two years' imprisonment of which 21 months were conditionally suspended, was set aside and the case was remitted to the magistrate to enable him to explain the nature and effect of section 7 to the accused and, after hearing any representations which the accused might wish to make, and to impose sentence afresh. In any event the sentence was obviously inappropriate. The quantity of dagga, the age of the accused and the absence of related previous convictions justified a lighter sentence.

---

92 at 442 H

In Nzama,<sup>93)</sup> the accused, a youth of 19 years of age had been sentenced to imprisonment for 2 years of which 18 months were conditionally suspended, after a conviction of possession of one partly smoked cigarette which contained a mixture of dagga and tobacco weighing approximately one-sixteenth of an ounce.

On review the sentence was set aside and substituted for by one of three months' imprisonment, the operation of which was wholly suspended for two years on certain conditions. The magistrate could have dealt with the accused in terms of sections 342 or 345 of the Criminal Procedure Act 56 of 1955. The sentence which he had imposed induced a sentence of shock.

In Ngcobo<sup>94)</sup> the accused who was about 23 years of age had possessed three cigarettes of dagga weighing three ounces. He had two previous convictions, one for housebreaking with intent to steal and theft and the other for unlawful possession of dagga in contravention of section 61(1)(d) of the repealed Act 13 of 1928. The magistrate had apparently erroneously regarded the last-mentioned conviction as a previous conviction for the purpose of bringing into operation the increased penalties in section 2. The magistrate had sentenced the accused to imprisonment for five years of which four and a half years were conditionally suspended.

On review the court was of the opinion that, because of the circumstances

---

93 at 440

94 at 444 A

of the accused and his previous convictions it could not be said that "*circumstances*" were present. However, the court felt that the magistrate had misdirected himself in considering the previous conviction in terms of Act 13 of 1928 for the purpose of imposing an increased sentence in terms of section 2 of the Act under discussion.<sup>95)</sup>

The sentence was set aside and in its place there was substituted that of two years' imprisonment of which 18 months were conditionally suspended.

Another case which illustrates a misdirection on the part of the magistrate is that of Khuzwayo.<sup>96)</sup> The accused, a youth of 21 years of age had been convicted of possessing half an ounce of dagga while walking on a public road. He had a previous conviction for contravening section 61(1)(d) of the repealed Act.<sup>97)</sup> As in the previous case, the magistrate had incorrectly regarded the previous conviction as resulting in the accused being convicted before him on a second or subsequent occasion. The magistrate had then sentenced the accused to imprisonment for five years of which four and a half years were conditionally suspended.

On review it was considered that as the accused was alleged to be 21 years of age there should have been an investigation into his precise age with a view to the possibility of dealing with him as

---

95 In Shangase and Others it was held that section 2 does not relate to previous convictions under the repealed Act, 13 of 1928. See also the Kroutz (at 924 G) and the Kukarie (at 914) cases

96 at 443 D

97 13 of 1928

a juvenile. The Attorney-general suggested to the court that as the accused had already served about five weeks of imprisonment the sentence should be altered to one of three months' imprisonment, the whole sentence conditionally suspended. The court gave effect to the suggestion of the Attorney-general by deleting the sentence, in its place substituting one of three months' imprisonment conditionally suspended for two years.

It is considered unnecessary to discuss all the cases the court dealt with in the Shangase and Others case. The influence of policy is clear from some of the sentences. The Full Bench of the Natal Provincial Division consisting of Harcourt, J (Kennedy, J and Muller, J concurring) with NC Masters, SC, Attorney-general, Natal, for the State and J J Kriek, SC (with him P W Thirion), for the accused at the request of the court, arguing on review, are to be congratulated on their success in giving such useful guide-lines and in ensuring that justice was done to accused persons who had been victims of misdirection on the part of magistrates caused by either over-emphasis on legislative policy or misinterpretation of such policy.

In Mamase and Others<sup>98)</sup> the Full Bench, as in the case of Shangase and Others,<sup>99)</sup> had to deal with cases which had been submitted by magistrates for review. It appears from the arguments that magistrates in the Eastern Cape had misdirected themselves in some aspects such as considering convictions in terms of the repealed Act, 13 of 1928

---

98 supra

99 supra

as previous convictions for purposes of increased sentences in terms of section 2 of the Act under discussion. The court dealt with the provisions of section 7 relating to circumstances justifying the imposition of a lighter sentence and enumerated factors which, in its opinion, fell within the definition of "*circumstances*". These factors are similar to those enumerated in the Shangase and Others case.<sup>100)</sup> The court had had an opportunity of reading and studying the decision in the latter case and it was "*substantially in agreement with the conclusions reached by the learned Judge*".<sup>101)</sup>

In the Transvaal as well, magistrates experienced problems in applying the provisions of the Act. In Nkosi and Others<sup>102)</sup> the Full Bench was concerned with 26 review cases relating to possession of or dealing in dagga in contravention of section 2 of the Act. Arguing for the accused at the request of the court were D J Curlewis, S C (with him A C Meyer), and C N van der Walt, S C, Deputy Attorney-general (with him A R Erasmus), for the State. Referring to the Shangase and Others case, Marais, J said that, that judgment had been made available to them and to counsel who appeared before them, shortly before the argument began. The judges said that the judgment contained a full and careful analysis of many of the problems with which they were concerned, and that it had been of the greatest assistance to them.

As in the Shangase and Others case some magistrates in the Transvaal,

---

100 supra

101 at 766

102 supra

in their reasons for their sentences submitted in answer to queries by judge before whom the cases had first come on automatic review, had referred, in justification of the sentences they had imposed, to the remarks by the Minister of Social Welfare during the debates on the measure in Parliament. The court remarked that it was not permissible for a court, in applying a statute, to have regard to statements made in the course of debates in Parliament and that the meaning of the provisions and the intention of the legislature must be gathered from the terms of the Act itself. The court quoted with approval Harcourt, J in the Shangase and Others case when he enumerated what he considered to be factors falling within the definition of circumstances justifying the imposition of a lighter sentence.

The court then dealt with each of the 26 cases, the particulars of which, unfortunately, do not appear in the report.

In Strauss,<sup>103)</sup> the accused, a 18 year-old White and first offender, had been convicted of possession of dagga. A magistrate had sentenced him to imprisonment for six months of which five months were conditionally suspended. Although this sentence was confirmed on review the court was of the opinion that it was wrong to sentence the accused to imprisonment without a report from a welfare officer or investigation under section 30 of the Act (enquiry with a view to establishing whether or not he should be committed to a rehabilitation centre) and that the action by the court a quo was in conflict with the spirit of the Act. There had been a delay in sending the record for review. When the case was being reviewed the accused had already served the

unsuspended portion of the sentence. In the circumstances the court confirmed the sentence.

In Sacks,<sup>104)</sup> the accused, a youth aged 20 years, had after conviction for possession of two ounces of dagga, stated in mitigation that he had been a drug addict for seven years and that he wished to be sent to a rehabilitation centre. He had no previous convictions.

The magistrate had imposed a sentence of imprisonment for two years. On review it was held that the magistrate should have called in the assistance of the probation officer who had been in contact with the accused and that such assistance would have enabled the magistrate to decide whether or not to stop the trial and order the holding of an enquiry in terms of the Act.<sup>105)</sup> It was held, therefore, that the matter should be remitted to the magistrate for reconsideration. The magistrate ought to have considered that "*prevention rather than punishment should be our motto*".<sup>106)</sup>

Although the magistrate had found that "*circumstances*" were present in Mphuthi<sup>107)</sup> he was of the opinion that he had no option but to impose imprisonment for two years on the accused, a Black male of 42 years

---

104 1972 2 SA 646 (OPD)

105 section 30

106 supra footnote 13 of this chapter

107 1972 2 SA 645 (OPD)

of age and first offender who had been convicted of being in possession of one gramme of dagga. On review the sentence was set aside. The case was remitted to the magistrate to consider the provisions of section 7 and then to impose an appropriate sentence. From what was said by experts at the South African Conference on dagga in Durban,<sup>108)</sup> dagga cannot be said to be a very harmful drug.<sup>109)</sup> It is therefore unbelievable that, for being in possession of one gramme of dagga, a first offender was sentenced to imprisonment for two years.

In Erasmus,<sup>110)</sup> a Coloured youth aged 20 years and first offender had possessed 1,5 grammes of dagga. Despite the existence of the circumstances justifying the imposition of a lighter sentence the magistrate had sentenced him to imprisonment for seven months. In his reasons for the sentence the magistrate had stated that the Act had prescribed maximum and minimum sentences. He had referred to the case of Kroutz and Andere,<sup>111)</sup> where it was said:

*"Die swaar strawwe deur die Wet bepaal is egter 'n aanduiding van die ernstige lig waarin die wetgewing hierdie oortredings sien, en dit moet terdeë in gedagte gehou word by die oplê van straf."*

---

108 supra

109 see the views of DuPre, Le Roux and Botha, footnote 13 of this chapter

110 1976 3 SA 131 (OPD)

111 supra at 926 H

The magistrate had stated:

*"Teen die agtergrond van hierdie riglyne het die hof oorweging geskenk aan 'n vonnis wat by die beskuldigde in sy omstandighede sal pas. Sy skoon rekord is 'n strafversagtende faktor. Die klein hoeveelheid dagga is in sy aanmerking geneem binne die konteks van die omringende omstandighede. Beskuldigde sê self dat hy dit rook. Die hoeveelheid dagga is nie per se strafversagtend nie - S V Kroutz, supra."*

Theron, J said that the usual sentence for a person with a clean record who was convicted of contravening the section in that he had in his possession or had used a small quantity of dagga, is a wholly suspended sentence of four to nine months' imprisonment. The judge went on to say that great weight should be attached especially to youth as a mitigating factor and that a young man of 20 years is not forced to acquaint himself with the inside of a gaol if it is in any way possible to avoid doing so.

The court confirmed the sentence of imprisonment for seven months but ordered that the whole sentence be conditionally suspended for three years. The sentence allowed by Mr Justice Theron seems to be in accordance with justice.

In Johnson<sup>112)</sup> the accused, a 56 year-old Coloured man had been convicted of possessing 0,875 grammes of dagga in the Worcester prison where

he was serving a sentence of imprisonment for five years for dealing in dagga. The magistrate had imposed four years' imprisonment.

The accused had other previous convictions including theft and assault with intent to do greivous bodily harm and possession of dagga in terms of the repealed Act. On review, Broeksma, J stated that the abolition by means of Act 76 of 1978, of the minimum sentence for possession of dagga in contravention of the section justifies in itself the viewpoint that the legislature had come to the conclusion that the discretion of the court in regard to sentence should be minimally limited and that it was not desirable that a minimum of two years' imprisonment for a first offence and five years' imprisonment for a subsequent offence should serve as a starting-point for the imposition of sentence. The court went on to say that it would frustrate the present objects of the legislature if the heavy sentences which were imposed in the past for the possession of a reasonably small quantity of dagga should serve as a guideline for the imposition of sentences which, in the light of the present dispensation, are unrealistic. In considering the sentences which were imposed before the abolition of the minimum sentences the judicial officer ought, as far as possible, to attempt to determine what sentences would have been imposed if the present dispensation had then existed. The court stated also that pursuant to the abolition of the particular minimum sentences under Act 41 of 1971 it was no longer necessary for a court to decide whether mitigating circumstances within the meaning of section 7 of the Act were present and the quantity of dagga involved in the offence is a factor which, together with all other applicable considerations can be taken into account in the

determination of an equitable sentence. The court concluded by saying that the judges of the Cape Provincial Division were agreed that sentences of more than two years' effective imprisonment (for contraventions of section 2(b) of Act 41 of 1971), even where the offence was committed in prison and where the accused had previous convictions for possession of or dealing in dagga, should only be imposed in very exceptional cases. The sentence was altered to one of imprisonment for two years.

The statement of the judge to the effect that the heavy sentences which were imposed in the grim past for the possession of relatively small quantities of dagga should not serve as a guideline for the imposition of sentences in terms of the new dispensation, is to be welcomed. The judge correctly pointed out that, in the light of the new penal provisions, those sentences were unrealistic.

#### 6.4 Statistics

A sample of 100 sentences imposed by the Lower Umfolozi (Empangeni) District court for contravening the sub-section was obtained. These sentences were imposed between 1 February and 31 July 1984 and were chosen at random. The sentences were imposed by three magistrates attached to this court. The sample was obtained from court records. As evidence was recorded mechanically it was not possible to establish from the records the circumstances in which dagga had been possessed. In nearly all the cases evidence had not been transcribed.

The table shows that four of the 100 accused had previous convictions

for contravening the section. The table further shows that three were sentenced to imprisonment exceeding six months. One was committed to a rehabilitation centre. Fourteen youths were sentenced to whipping with a light cane in terms of section 294 of the Criminal Procedure Act. The average was 4 "cuts". These youths were first offenders. Although whipping is drastic, criticism of the sentences would not be justified. Suspended sentences would have been inappropriate. It has been said earlier that a severe sentence cannot be justified by the fact that it is suspended. The alternative would have been dealing with them in terms of section 290 of the Criminal Act<sup>113)</sup> if evidence warranted such a step. It can therefore be said that from the available information all the sentences appear to have been influenced by guidelines given by our Provincial Divisions, especially in the case of Shangase and Others<sup>114)</sup> and are therefore in accordance with the present sentencing policy of our courts.

---

113 explained earlier

114 supra

TABLE (continued)

1		2		3	4		WHIPPING IN TERMS OF SECTION 294
QUANTITY OF DAGGA		AGE OF ACCUSED		PREVIOUS CONVICTIONS FOR CONTRAVENING SECTION 2	SEX		
NUMBER		YEARS	NUMBER		MALE	FEMALE	
LESS THAN 10 GRAMS	MORE THAN 10 GRAMS						
4	Nil	16-18	4	Nil	4	Nil	4
14	Nil	19-20	14	Nil	14	Nil	10
41	15	21-30	56	2	55	1	Nil
14	5	31-40	19	2	18	1	Nil
5	Nil	41-50	5	Nil	5	Nil	Nil
<u>1</u>	<u>1</u>	51+	<u>2</u>	<u>Nil</u>	<u>2</u>	<u>Nil</u>	<u>Nil</u>
<u>79</u>	<u>21</u>		<u>100</u>	<u>4</u>	<u>98</u>	<u>2</u>	<u>14</u>

ABLE (continued)

## SENTENCES

LESS THAN 3 MONTHS' IMPRISONMENT	3-6 MONTHS' IMPRISONMENT	7-12 MONTHS' IMPRISONMENT	13 MONTHS - 2 YEARS' IMPRISONMENT	COMMITTED TO REHABILITATION CENTRE
Nil	Nil	Nil	Nil	Nil
Nil	4 <sup>x</sup>	Nil	Nil	Nil
10 <sup>x</sup>	33 <sup>x</sup>	1 <sup>x</sup>	2 <sup>x</sup>	Nil
7 <sup>x</sup>	13 <sup>x</sup>	Nil	Nil	1
Nil	4 <sup>x</sup>	Nil	Nil	Nil
2	Nil	Nil	Nil	Nil

Indicates that the whole sentence was conditionally suspended.

Indicates that the sentence was not suspended.

Under "3 - 6 months' imprisonment" two of the four sentences were conditionally suspended and the other two were not suspended.

## 6.5 Conclusion

The Act empowered magistrates to impose sentences which they normally would not have imposed.

Some magistrates stated in their reasons for sentence that they had considered the speech of the Minister of Social Welfare made during debates in Parliament. Unfortunately they did not seriously consider other relevant factors, thus misdirecting themselves. Eventually they imposed sentences which raised a "*sense of shock*".

As regards section 2(a) some magistrates did not consider alternatives to imprisonment in respect of juvenile accused.

After the Act had been amended to the effect that sentences could be suspended, some magistrates were adamant that the whole sentence could not be suspended.

Concerning section 2(b) it appears that, although section 7 applied as from the commencement of the Act, it was in some cases overshadowed by government policy considerations. It is surprising to note that "*experienced*" and high-ranking magistrates were involved in this glaring error. This is apparent from the Shangase and Others case. They did not impose appropriate sentences on accused persons below the age of 21 years in some cases.

What follows relates to both sub-sections (i.e. 2(a) and 2(b)). The "*social evil*" has, despite such heavy sentences, not been "*stamped*

out". The Minister of Law and Order, answering a question in Parliament,<sup>115)</sup> stated that during the previous year the South African Police had confiscated 589 183 kg of dagga worth about R300 000 000.

The decisions of our superior courts and amendments which have been effected to the penal provisions are to be welcomed. Some lawyers<sup>116)</sup> feel that the abolition of the minimum sentences and the "*no suspension, discharge with a caution or reprimand and postponement of passing of sentence*" clauses were a move towards justice. They feel that the legislature should amend the Act to introduce fines.

If proceedings of magistrates' courts were not reviewable, it is very clear from the cases that many accused persons who had contravened the two sub-sections would have served unnecessarily long terms of imprisonment. Although some sentences were set aside or reduced on review or appeal, accused persons had been in prison for some considerable periods.

The step which was taken by the Natal Provincial Division in Shangase and Others case and other Provincial Divisions, of providing magistrates with guide-lines is highly appreciated. Although some sentences were interfered with on appeal or review, some accused persons, as a result of inappropriate terms of imprisonment, apparently lost their employment or experienced family problems. Some of these problems could result in irreparable losses.

---

115 Hansard, April 14, 1983 Columns 973 and 974

116 All 25 Black magistrates attending a refresher course at the Institute for Public Service and Vocational Training, University of Zululand during the period 22-11-1983 and 2-12-1983.

Appeal and reviewing judges have, through their judgments, succeeded in changing the sentencing policy of our magistrates. Some magistrates believed that they were applying the policy of the legislature when they imposed unduly severe sentences, disregarding other considerations. It can also be said that some magistrates misinterpreted the sentencing policy of the legislature to the detriment of accused persons. The Legislature did well by changing its policy through the 1978 Amendment Act.

The Department of Justice ought to take possible steps to prevent or reduce inappropriate sentences by, for example, causing seminars to be held at different regions where penal provisions<sup>117)</sup> of new statutory measures should be discussed by magistrates, before their application takes effect.

---

117 where, for example, a fine exceeding R100 and/or compulsory imprisonment are provided.

CHAPTER IVTHEFT OF STOCK1. INTRODUCTION

Section 13<sup>1)</sup> confers jurisdiction on a magistrate's court to impose, in the case of a first conviction for the theft of stock, imprisonment for a period not exceeding two years or whipping not exceeding ten strokes or both such whipping and imprisonment for any period not exceeding two years or a fine not exceeding R2 000 or both such fine and imprisonment for a period not exceeding two years.

In the case of a second or subsequent conviction the section provides for imprisonment for any period not exceeding three years or whipping not exceeding ten strokes or both such whipping and imprisonment for any period not exceeding three years.

2. POLICY

Reading the Stock Theft Bill a second time, the Minister of Justice, among others, said:

---

1 Act 57 of 1959. Some cases relating to sentences imposed on stock thieves convicted of contravening the 1923 Stock Theft Act (26 of 1923) will be referred to. The latter Act made provision for the maximum period of imprisonment of two and a half years and the maximum fine of R500. Magistrates' courts had jurisdiction to impose these sentences.

"In the past agricultural unions continually made all sorts of requests to me to tidy up the law in regard to stock theft. In this House also hon. members have from time to time asked that strong measures should be adopted with regard to stock thieves." 2)

The Minister further said that maximum penalties had been provided for in the Bill.

From the speech of the Minister it is obvious that stock farmers have influenced the policy of the Government concerning sentence on stock thieves. From circulars which have been issued to public prosecutors in the province of Natal by Attorneys-general of this province it appears that stock farmers complain to the latter about what they consider "*inadequate sentences in stock theft cases*".<sup>3)</sup> In the first-mentioned circular the Attorney-general, among others, said that he had received numerous complaints about the prevalence of stock theft and about inadequate sentences in stock theft cases. He said that although sentences are obviously a matter for the discretion of presiding officers, prosecutors could assist presiding officers by placing information before the court by way of evidence on sentence, as well as by arguing that severe sentences should be imposed as a deterrent. The Attorney-general suggested to public prosecutors that local police, as well as local farmers could often give evidence of the prevalence of stock theft in their areas.

---

2 Hansard, February 2, 1959 column 291

3 Circulars 11/80 dated 3 June 1980 and 3/81 dated 11 May 1981 (unpublished)

In Circular No 3/81 the Attorney-general reminded public prosecutors that it was in the public interest that offenders in stock theft cases should be adequately punished and that, to determine an appropriate sentence the court is entitled to the assistance of both the prosecutor and the defending counsel. Paragraph 2 of the circular provides that the following cases must be tried before the Regional Court:

- "(a) In all cases where the value of the stock involved exceeds R1 000.
- (b) In the case of a first offender who is charged with the theft of two or more head of cattle.
- (c) In all cases where it appears to the prosecutor that a sentence in excess of that authorised by section 13 of the Stock Theft Act ought to be imposed.
- (d) Where the particular circumstances of a case appear to warrant a prosecution in the Regional Court."

What has been said clearly shows that theft of stock is viewed in a serious light. It is unfortunate that many accused persons charged with stock theft appear unrepresented. The prosecution policy is likely to affect them adversely. One can only hope that, after hearing the evidence of local farmers and local police, magistrates do advise unrepresented accused to present evidence in mitigation of sentence and that they assist such accused persons in presenting such evidence.

The Act does not create any special offence of stock theft. Kannemeyer, J said:

"The Stock Theft Act, 57 of 1959, does not provide any penalty for the theft of stock, nor does it create any special offence of stock theft. The offence remains theft but it is subject to the various special provisions of the Act. However no minimum or maximum penalty is prescribed by the Act except under section 14 which for present purposes is irrelevant. Any person found guilty of the theft of stock is punishable within the limits of its jurisdiction. What section 13 of the Stock Theft Act does is to increase the criminal jurisdiction of magistrates' courts. In so doing, it does not, in my view, intend to provide specially heavy sentences. This section rather indicates an appreciation on the part of the Legislature of the frequency with which this offence is committed in circumstances rendering the crime a comparatively serious one. The jurisdiction of magistrates' courts is enhanced to enable them to deal with such cases and to avoid the necessity of indicting the majority of them before a regional or a Supreme Court. Thus, it would seem to be a misdirection to say that the legislature has provided heavy punishment for stock theft".<sup>4)</sup>

Referring to the 1923 Stock Theft Act, Van den Heever, J said that the Legislature had "seen fit to visit very severe penalties upon stock theft, out of all proportion to the sanctions conceived in protection of other classes of property. It is not for the courts to question

---

4 Tshawana 1969 2 SA 252 (E) at 253. The case is discussed later in this chapter

the policy of the Legislature but to administer the law as it stands."<sup>5)</sup>  
 In the light of the statement of Kannemeyer, J in the preceding paragraph and that of Wessels, J,<sup>6)</sup> Mr Justice Van den Heever was, with respect, mistaken about the effect of the Act. It cannot therefore be said that the sentencing policy of the Legislature is that heavy sentences be imposed on stock thieves. It is the sentencing policy of the courts.

### 3. CASES

In Jacob en 'n Ander<sup>7)</sup> two Black accused aged 52 and 27 years respectively, had been convicted of the theft of one sheep, worth three pounds, in terms of the 1923 Act, the property of a farmer in Postmasburg.

The magistrate had sentenced each of the accused to imprisonment for six months with compulsory labour. Both accused had no previous convictions.

Reviewing the proceedings, Mr Justice Diemont said:

"Ek het opgemerk dat in die groot meerderheid van hierdie sake geen poging aangewend word om die omstandighede te ondersoek of om vas te stel of daar enige versagtende omstandighede bestaan nie. Die gebruiklike vonnis - ses maande gevangenisstraf met dwangarbeid word eenvoudig opgelê. Mynsinsiens is dit nie reg nie." 8)

---

5 Moqena 1943 OPD 61 at 62

6 Hemley en 'n Ander 1960 1 SA 397 (GWLD) at 398

7 1959 2 SA 269 (GWLD)

8 at 269

The judge then referred to the statement of Judge van den Heever.<sup>9)</sup> He then said that in all stock theft cases in which non-Europeans had stolen from their employers and in which the meat had been consumed by the accused or his family the court ought to examine the complaint to determine whether the accused was an employee, what his rations and wages were. In the case where he received no ration of meat whether it was possible for him to obtain it lawfully elsewhere. If it appeared from the circumstances that the accused and his family suffered from a shortage of meat and that the employer was in a measure responsible therefor, then this should be a mitigating factor which ought to influence the magistrate in imposing sentence. In casu no such evidence had been led.

The sentences were set aside and the case was referred back to the magistrate so that the complainant and the two accused should be recalled to place evidence before the court.

The judgment of Mr Justice Diemont is to be welcomed. It has the effect of changing the sentencing policy of the courts in such cases. It should, however, be said that the enquiry referred to by the judge should not be confined to non-European employees but should extend to European employees who might be convicted of stealing stock from their employers.

In Mkwanazi<sup>10)</sup> the appellant, a Black, had been convicted of the theft

---

9 In Moqena case (supra).

10 1960 2 SA 248 (NPD)

of two head of cattle, the property of a White butcher. The magistrate had sentenced him to undergo six months' imprisonment. The accused was a first offender. In his reasons for sentence the magistrate had stated that stock theft in his district was a common occurrence and the majority of farmers and Black peasants were stock farmers and that the offence could therefore not be treated too leniently.

Mr Justice Jansen said that a sentence of six months' imprisonment for a first conviction is certainly not a light one. The judge said, however, that it would be difficult to say that it aroused a sense of shock, especially if it was borne in mind that the accused had occupied a position of trust. The accused had been a purchaser of cattle on behalf of the complainant and had, without any mandate to do so, exchanged two of the cattle purchased and paid for by the complainant, for two of his own, after ownership had passed to the complainant.

The judge felt that the mere fact that the magistrate in effect had found that the complainant had been compensated did not in any appreciable degree derogate from this point of view.

Although the accused had breached his position of trust he deserved a lenient sentence. He was a first offender and had compensated the victim. A first offender should, as far as possible, be kept out of gaol.<sup>11)</sup> *"There is the humanitarian argument that it is generally more humane to leave an individual with his family and (where applicable)*

---

11 Ashworth 429-430 Hiemstra 578, 583 Harcourt: A B 'Swift's Law of Criminal Procedure' 2 ed 1969 at 596 M 1979 2 SA 25 (AD) Mthetheleli 1979 2 PH H 166

his employment than to remove him from society".<sup>12)</sup> Had the magistrate imposed a fine or suspended the whole or a greater portion of the sentence justice would have been done.

In Manho<sup>13)</sup> the accused had stolen one goat worth three pounds. He was a first offender aged 20 years. The magistrate had sentenced him to imprisonment for nine months. In his reasons for sentence the magistrate had emphasized the provisions of the Act that a first offender could be sentenced to imprisonment for 18 months. The magistrate had further referred to the circumstances of his district that 50% of the district, Riversdal, was dependent on stock farming. The magistrate had further stated that the accused had no fixed employment and that he was therefore a danger to stock farmers. The magistrate had added that the accused was a healthy and strong person and had advanced no reason "*waarom hy belet word om 'n eerlike bestaan te voer nie*".

Reviewing the proceedings, De Villiers, A J referred to the judgment of Mr Justice Wessels in Hemley en 'n Ander<sup>14)</sup> and concluded that on charges of stock theft the usual norm for a first offender in respect of one goat or one sheep is not higher than four to six months' imprisonment and that exceptional circumstances may result in the punishment being higher or lower than the general norm and that it is not right that the norm itself should change from district to district.

---

12 Ashworth 429

13 1960 3 SA 200 (CPD)

14 supra

The sentence was allowed but it was ordered that five months thereof be conditionally suspended for three years. With respect, the sentence allowed by the judge was not a logical conclusion and was not favoured by the circumstances of the case. It has been said that an unreasonably severe sentence cannot be justified by the fact that it is conditionally suspended, as it may be put into operation if the conditions of suspension are violated. The age of the accused entitled the magistrate to deal with him in terms of section 290 or 294 of the Criminal Procedure Act, especially because the accused was a first offender. The magistrate and the reviewing judge were influenced by the sentencing policy of the courts to impose sentences of imprisonment on stock thieves. The existence of this policy is confirmed by sentences imposed in cases discussed later.

Even in cases where there are no aggravating factors some magistrates will, to carry out their sentencing policy, impose unreasonably severe sentences. This is apparent from the case of Hemley en n Ander.<sup>15)</sup> In this case the two accused, both aged 25 years and first offenders had been convicted under the 1923 Act of stealing one sheep worth four pounds, the property of their employer. They were each sentenced to imprisonment for nine months with compulsory labour. Giving the reasons for sentence the magistrate had said that "*Veediefstal is n ernstige oortreding en dit is n oortreding wat ernstige afmetings in hierdie distrik aangeneem het.*" Reacting to the magistrate's reasons, Mr Justice Wessels said:

---

15 supra

"Die landdros verwys daarna dat veediefstal 'n ernstige oortreding is. Na my beskouing is dit nie korrek om dit sonder meer te stel dat dit as 'n tipe misdryf ernstiger as ander soorte diefstal is nie. Die diefstal van vyftig pond kontant van 'n boer is na my beskouing in gewone omstandighede 'n ernstiger misdryf as die diefstal van sy gusooi ter waarde van twee pond. So ook, as die teenstelling tussen 'n halwe karkas van 'n hoender en 'n waardevolle goue polshorlosie is."16)

The judge stated that the usual sentence for that sort of case was four to six months' imprisonment with compulsory labour and that it is the circumstances under which the theft of stock or produce is committed which determine whether or not the specific case which comes before a magistrate's court justifies an unusually heavy sentence. The sentences of the two accused were altered to those of six months' imprisonment with compulsory labour. What has been said about keeping first offenders out of gaol applies in this case. It is unfortunate that a first offender who had stolen a sheep worth four pounds had to serve six months' imprisonment with compulsory labour. Ashworth says: "*Yet there is no doubt that the value of the property obtained is an important element in assessing the gravity of a property offence*".<sup>17)</sup>

A more shocking sentence was imposed in the case of Ndhlovu.<sup>18)</sup> The accused, a Black male of about 35 years of age had been convicted of theft of a duck worth R1,25, the property of his employer. The

---

16 at 398

17 At 181. See Hiemstra 629. See Chiloane case infra

18 1961 2 SA 637 (NPD)

accused was a first offender. The magistrate had sentenced him to imprisonment for six months. In his reasons for sentence the magistrate had, among others, said:

"I agree with great respect that the sentence passed in this case is a robust one. Ixopo is chiefly a farming community where farmers mainly farm with stock and poultry. During 1960 approximately 89 cases of stock theft were tried at Ixopo alone apart from the three periodical courts in the district." 19)

The magistrate had further stated that thieves had caused poultry farming in the district to be "a risky and unrewarding business" and that

"... for approximately two years a sentence of six months had been the normal sentence passed on first offenders for the theft of say one fowl where no mitigating circumstances existed".20)

Reviewing the proceedings, Wessels J said:

"The magistrate refers to the fact that no mitigating factors were found to be present in this case and adds that the fact that the accused stole the duck from his master would seem to be an aggravating factor."21)

---

19 at 637

20 at 638

21 Ibid

In the judge's opinion the magistrate had misdirected himself where he decided that, without more, the fact that an employee had stolen from his employer was an aggravating factor. The magistrate had not heard any evidence regarding the conditions of employment of the accused. The judge said that the sentence appeared to be so severe as to be unjust and he ordered that it be altered to one of three months' imprisonment.

The case of Mabisela<sup>22)</sup> shows serious consequences of over-emphasis of the seriousness of the offence. A Black male aged 22 years had been convicted of the theft of two fowls worth one pound and ten shillings. He had no previous convictions. The magistrate had sentenced him to nine months' imprisonment.

The reviewing judge, Mr Justice Galgut, referred to some judgments of his Division in which judges had emphasized that a sentence of imprisonment for six weeks or two months was adequate punishment for the theft of one or two fowls by a first offender. The sentence was set aside and one of three months' imprisonment was substituted therefor.

In Madlala<sup>23)</sup> the accused had been sentenced to undergo 180 days' imprisonment after a conviction of the theft of 17 sheep. The case deals with compensatory fines and does not contain the particulars of the accused. In Chiloana<sup>24)</sup> the accused had stolen a rooster worth 80 cents belonging to a Black woman. The accused had killed

---

22 1960 4 SA 117 (TPD)

23 1968 1 SA 329 (NPD)

24 1962 4 SA 567 (TPD)

the rooster but it had been recovered by the complainant the following day. The complainant had eaten it. The accused had a previous conviction for the theft of a plough worth R10 for which he had been fined R30 or in default of payment to undergo 90 days' imprisonment. The magistrate had sentenced the accused to 180 days' imprisonment. The sentence appears appropriate. Theft of 17 sheep should be viewed in serious light.

In his reasons for sentence the magistrate had stated that he had taken into account that the only livestock a number of Black owned was fowls and that theft of fowls was prevalent in the district. The reviewing judge, Mr Justice Trollip, referred to several cases including the one of Choaka in which Ramsbottom, J stated:

*"The theft of fowls is prevalent everywhere, and I do not know a time when this type of offence was not prevalent. Severity of sentence does not prevent people from stealing fowls. The temptation to take a fowl is a strong one and has always been a strong one ... I think that, when the court is dealing with an offence of this kind, it must have regard to the fact that although it is difficult to protect fowls, they are not very valuable forms of property."* 25)

The sentence was reduced to imprisonment for 90 days.

In Tshawana<sup>26)</sup> the accused aged 40 years had been convicted of six

---

25 quoted in Mabisela case (supra). It was before the Transvaal Provincial Division on 12-06-1958

26 supra

counts involving the theft of nine horses worth R666. The accused had one previous conviction (it is not stated in the report what it was for) which was ignored for purposes of sentence. He had been sentenced to 12 months' imprisonment on each count. In his reasons for sentence the magistrate had stated that the following factors were aggravating: the fact that the horses had been stolen in Lesotho and had been brought into the Republic, the considerable value of the horses, that stock theft is a serious crime and the the legislature has authorised heavy penalties in respect thereof. The judge did not consider the latter view justified because, he said, the Stock Theft Act, 57 of 1959 does not provide any penalty for the theft of stock. He further said that it did not create any special offence of stock theft and that the offence remained theft but it was subject to various special provisions of the Act. The judge was further of the opinion that it would seem to be a misdirection to say that the legislature has provided heavy punishment for stock theft.

The judge was of the opinion that there was a striking disparity between the sentence imposed by the magistrate and the one he considered appropriate. The sentence was reduced to six months' imprisonment on each of the six of counts. The magistrate had misinterpreted the Legislature's policy by holding that the Legislature had authorised heavy sentences.

Our courts correctly emphasize that in a case where a non-White accused has stolen stock from his employer it should be asked before sentence is imposed what wages the employer pays the employee. In Nkubo en n Ander<sup>27)</sup> the two accused had been convicted of the theft of one

sheep, the property of a White farmer. The record does not reflect the ages of the accused nor does it show whether or not they had previous convictions. The magistrate had sentenced the accused to four months' imprisonment and 18 months' imprisonment (of which nine months were conditionally suspended), respectively.

Before the sentences were imposed the first accused had informed the magistrate that he earned R3 per month and received half a bag of mealie meal and that he had five children aged 20, 18, 16, 10, and 8 years, respectively. He had asked that a suspended sentence be imposed. From the magistrate's reasons for sentence it appears that he had ignored the first accused's statement that he earned R3 per month and received half a bag of mealie-meal.

Reviwing the proceedings, Mr Justice Smuts referred to the statement of Diemont, J<sup>28)</sup> to the effect that in cases of this type the enquiry referred to earlier should be conducted by the court before sentence is imposed.

The sentences were set aside and the case was referred back to the magistrate to act in the light of what has been said.

The Appellate Division<sup>29)</sup> has shown that imprisonment is not the only sentence which should be imposed on stock thieves. In this case the

---

28 in Jacob en n Ander (supra)

29 in Scheepers 1977 2 SA 154 (A D)

accused, a 42 year old White male had been sentenced by a regional court to undergo 12 months' imprisonment for the theft of one beast which belonged to a Black male.

The accused was a first offender and was unmarried. The accused had unsuccessfully appealed to the Transvaal Provincial Division. In his reasons for the sentence the magistrate had, among others, advanced the following reasons: that his district bordered Swaziland and that stock theft was prevalent, that the accused, a White, had stolen a beast belonging to a Black, that the sentence which had been imposed on the accused was normally imposed by that court on Blacks who had committed the offence and was confirmed on review and that the sentence should serve not only as punishment but also as a deterrent for possible offenders.

On behalf of the accused it was argued that at the age of 42 years he was a first offender who would lose an annual income of R12 000 as a result of imprisonment. It was further argued that the sentence was shocking. Kotze, A J A concluded that the appeal should be dismissed.

In his judgment, Viljoen, A J A stated that the magistrate had been influenced by sentences which had been imposed on Blacks who had committed the offence and had thus misdirected himself. The judge of Appeal stated further that it is an established principle of our law that, in regard to punishment there should be individualisation and that in the process of individualisation sociological circumstances and other relevant circumstances which surround the individual cannot be lost sight of. The judge concluded that the sentence imposed by

the magistrate be set aside and be substituted for by one of a fine of R1 000 or in default of payment, to undergo imprisonment for six months. A further six months' imprisonment was to be conditionally suspended for three years. It was added that the fine could be paid in instalments if the appellant approached the magistrate and his application was granted. Wessels, A J concurred.

To be welcomed in this case is that compulsory imprisonment is not the only type of punishment in cases of stock theft. In all the cases discussed earlier compulsory imprisonment was imposed even where there were strong mitigating circumstances. Magistrates ought to change their sentencing policy and impose fines in appropriate cases, which is the Legislature's sentencing policy.

In Khumalo and Others<sup>30)</sup> the first accused had been convicted of six counts involving 61 goats. He had been sentenced to three years' imprisonment of which one year was conditionally suspended for five years on each count - an effective sentence of 12 years' imprisonment. The first accused was aged 33 years and had two previous convictions of stock theft. He had played a leading role in the theft of the goats.

The second accused had no relevant previous convictions. He was 40 years of age and had been convicted of five counts. He had been sentenced on each of the five counts to two years' imprisonment of which one year was conditionally suspended. The third accused, aged 29 years was a first offender. He had been convicted of five counts and had

been sentenced on each count to imprisonment for two years of which one year had been conditionally suspended.

In his reasons for sentence the magistrate had stated: "*Die hof moes ook in ag neem dat hy (nr 1) waarskynlik nie meer as ses jaar van sy vonnis sal uitdien voor hy op parool uitgelaat word nie.*" It is obvious that the magistrate had been influenced by the same consideration when he imposed sentences on the other accused.

On review it was held that the magistrate's approach in connection with the release on parole of the first accused was wrong and amounted to a serious misdirection and that the magistrate had not taken into account the cumulative effect of the sentence on the first accused. The sentence of the first accused was reduced to one of two years' imprisonment on each count of which nine months were conditionally suspended. The sentences imposed on the second and the third accused were reduced to 15 months' imprisonment on each count of which five months were conditionally suspended.

The attitude of our courts is that in sentencing stock thieves where stock is stolen from farmers whose farms border other countries and the stock, because it has been removed over the border, is not easily recovered, courts are entitled to consider the interests of such farmers.<sup>31)</sup>

In this case the accused had been convicted by a regional court magistrate in Rustenburg of the theft of 17 head of cattle worth about R3 000, the property of a farmer whose farm bordered on Bophuthatswana. The

---

31 Huma 1983 1 SA 40 (A D)

cattle had been driven into Bophuthatswana. Thirteen of the cattle worth R2 200 had been recovered. The accused was 38 years of age and was a first offender. He had been in regular employment before the commission of the offence. The magistrate had sentenced him to undergo seven years' imprisonment. The magistrate had, in his reasons for sentence, stated:

*"Ek moet ook kyk onder andere na die belange van die boere op die grens. Dit is van belang dat hulle beskerm moet word. Dit sou 'n kwade dag wees indien die boere op ons grens sou moet padgee omdat hulle uitgeroei word op die grense, hulle vee gesteel word, ensovoorts."*<sup>32)</sup>

The accused had unsuccessfully appealed to the Transvaal Provincial Division. He had then appealed to the Appellate Division. While conceding that the circumstances in which the offence had been committed were aggravating, Rabie, C J considered these mitigating factors: the age of the appellant, that he was a first offender and that he had been in regular employment. The sentence of imprisonment for seven years was confirmed but it was ordered that three years thereof be conditionally suspended for five years.

The magistrate had apparently not given the necessary attention to the mitigating factors referred to by Rabie, C J . In Mthetheleli<sup>33)</sup> the judge was of the opinion that if the circumstances of the case do not justify keeping the first offender out of prison, the term of

---

32 at 44

33 supra

imprisonment should not be such that the accused remains in the company of hardened criminals for a long period. Although the appellant in the Huma case would remain in prison for a long time the judgment of the Appellate Division suits the circumstances of the case.

#### 4. STATISTICS

A sample of ten sentences imposed by the Lower Umfolozi (Empangeni) magistrates' courts was obtained. The sentences were imposed between 1 October 1983 and 30 May 1984 by two magistrates attached to this court. The sentences are shown in the table that follows. Court records were the source of information.

Unfortunately mechanically recorded evidence had not been transcribed in all the cases. It was therefore not possible to establish whether or not circumstances existed which justified sentences of fines or suspension of portions of the sentences, especially those of the other three who had no related previous convictions. From the available information the sentences cannot be criticised.

TABLE

1		2		3		4		5		
TYPE OF STOCK		AGE OF ACCUSED		SEX		RELATED PREVIOUS CONVICTIONS	UNRELATED PREVIOUS CONVICTIONS	SENTENCES		
NUMBER	YEARS	NUMBER	NUMBER		NUMBER	NUMBER	6-9 months' imprisonment	12-18 months' imprisonment	2-3 years' imprisonment	
			MALE	FEMALE						
A. CATTLE	4	32 - 37	4	4	NIL	2		1	2	1
B. GOATS	32	23 - 30	2	2	NIL	1	1	NIL	NIL	NIL
		31 - 38	4	4	NIL	3	1	2	2	NIL

EXPLANATION

Six months of the 15 months' imprisonment imposed on a goatthief, with one unrelated previous conviction, who had stolen 4 goats, were conditionally suspended. The other sentences were not suspended. As regards goats, at least three goats were stolen in each case. According to records the average value of one beast was R350 and that of a goat was R25. The accused sentenced to imprisonment for three years had two previous convictions for stock theft. The sentence had been confirmed on review. Two of the four accused convicted of stealing cattle (one cow in each case) had no previous convictions.

## 5. CONCLUSION

Some of the judgments which have been discussed show that the sentencing policy of the courts was contrary to principles of sentencing and resulted in disturbingly inappropriate sentences. Although the two Acts make provision for the imposition of fines on first offenders magistrates prefer compulsory imprisonment sentences. The cases do not show that investigations aimed at establishing the financial means of accused persons were conducted before sentences were imposed. Emphasis is laid on the policy of the legislature to the detriment of other factors which ought to be taken into account as mitigating factors. In most cases there is a striking disparity between sentences imposed by magistrates and those allowed by reviewing and appeal courts. It is unfortunate that some proceedings in the magistrates' courts are not automatically reviewable by superior courts.<sup>34)</sup> It is possible that inappropriate sentences imposed by regional courts and magistrates who have held the substantive rank of magistrate or higher for a period of seven years, would be interfered with on appeal or review if they had come before judges. One can only pity those accused persons.

Decisions by judges in most of the cases which have been discussed are to be welcomed. The following guidelines by judges are useful:

- (i) The legislature has given no indication that in cases of stock theft, mitigating circumstances should not be taken into account,<sup>35)</sup>

---

34 section 302 of the Criminal Procedure Act

35 Moqena case (supra)

- (ii) An attempt must be made to investigate circumstances with a view to establishing whether or not mitigating factors exist,<sup>36)</sup>
- (iii) In a case where the accused is an employee who has been convicted of the theft of his employer's stock and the said accused has consumed the meat, the court should establish what the wages of the accused are and whether or not such wages can enable him to obtain meat lawfully elsewhere,<sup>37)</sup>
- (iv) The theft of fowls is prevalent everywhere. Prevalence of the crime should therefore not be over-emphasised,<sup>38)</sup>
- (v) Severity of sentence does not prevent people from stealing fowls,<sup>39)</sup>
- (vi) A fine, instead of compulsory imprisonment, may be imposed on a first offender,<sup>40)</sup>
- (vii) The fact that a convicted and sentenced accused person might be released on parole should not affect his sentence.<sup>41)</sup>
- (viii) The Stock Theft Act does not create any special offence of stock theft nor does it provide any penalty for the theft of stock. The offence remains theft which is subject to the various special provisions of the Act.<sup>42)</sup>

---

36 Jacob en n Ander case (supra)

37 Ibid

38 Chiloane case (supra)

39 Ibid

40 Scheepers case (supra)

41 Khumalo and Others (supra)

42 Tshawana case (supra)

CHAPTER VCONCLUSION1. FINDINGS

From what has been said it is clear that some judges and advocates seriously doubt the independence of our magistrates.<sup>1)</sup> According to the Hoexter Commission the image of criminal justice in our lower courts is *"impaired by observance for administrative arrangements incompatible with the standard of judicial aloofness expected of magistrates"*.<sup>2)</sup>

Magistrates are public servants appointed subject to the provisions of the Public Service Act. They are transferred without their consent. They are dependent on merit assessment for promotion and salary increase. In merit-assessing a magistrate use is made of reports by the head of his department, his regional merit committee and the central merit committee.

A magistrate is liable to a possible departmental inquiry by the Executive. He is, as a result of the inquiry, liable to a possible finding of guilty of misconduct.

The Public Service Act<sup>3)</sup> defines misconduct as disobeying a *"lawful order given by a person having authority to give it"* and commenting in public

---

1 views of Eksteen, J Dicott, J Milne, J Sydney Kentridge, S C and submissions of the Hoexter Commission

2 Fifth and Final Report, Part A 27

3 supra section 17 (c)

"upon the administration of any department".<sup>4)</sup> A finding of guilty of misconduct by the Executive may lead to termination of his services. These provisions are contrary to justice. On being found guilty of misconduct, in terms of the Public Service Act, the Commission for Administration may recommend to the Minister of Justice that such magistrate's salary or grade or both his salary and grade be reduced to a recommended extent.<sup>5)</sup>

Judges of the Supreme Court are not appointed subject to the provisions of the Public Service Act. The above-mentioned anomalies and shortcomings in the protection of judicial independence of judicial officers do not apply to them.

A transfer from one office to another may entail serious consequences, such as parting with acquaintances and experiencing schooling problems relating to a magistrate's children. Health problems flowing from change of environment may be experienced. It is obvious that some magistrates will, as far as possible, avoid transfers. Those will always attempt not to annoy their master. They will always heed departmental instructions even when they discharge their judicial duties. For example, if a magistrate acted contrary to the departmental instruction which prohibited him from commenting unfavourably on the evidence of a police officer (referred to in the first chapter of this work) he could be subjected to an enquiry which could result

---

4 section 17(f)

5 section 18(2.1)(d) and (e)

in termination of his services, reduction of his grade or salary or a transfer to another court. Mr Sydney Kentridge, S C says the following about the independence of judges:

*"... it would be unthinkable that any such method would be used to remove a judge merely because he gave a judgment or judgments which the Government did not like. The independence of the judge is thus a reality and not a mere legal fiction".6)*

The proposed creation of intermediate courts to be staffed by our regional magistrates has met with criticism from judges.<sup>7)</sup>

The criticism stems from the suspicion *"... that those who best carry out 'policy' as referred in the report will get promotion".8)* Mr Justice Milne went on to say that if magistrates were to be made *'more like judges in power and function'* it was absolutely necessary to make them more like judges in training and conditions of service also. Mr Justice Eksteen<sup>9)</sup> said the magistrates are trained in the civil service to act as the administrative organ to carry out Government policy through out the country.

That leading lawyers of the country believe that magistrates are not independent is further obvious from the comment of E Louw in

---

6 at 651

7 such as Mr Justice Milne at 459

8 Milne at 460

9 at 519

"De Rebus Procuratoriis"<sup>10)</sup> where it is said that there used to be a time when magistrates enjoyed considerable status in the public service and, as a result, in the eyes of the communities they served. The editor further said that "the Government has allowed their status to be devalued. In the public service they do not rank as high as they used to. Although the magistrate is the senior - sometimes only - Government representative in the community he is no longer adequately cloaked with the trappings of status," because "his function as judicial officer is deflated by the numerous petty duties with which he is often overloaded."

Some of the evidence adduced before the Hoexter Commission<sup>11)</sup> was to the effect that Commissioners had to exercise judicial powers as well as the performance of administrative functions and that such authority enabled a commissioner as a representative of the government "om die beleid van die Regering uit te voer en om beleidsaspekte soos deur die Departement bepaal aan Swartes tuis te bring". It was argued that it was "monstrous and quite untenable for officers of the very department which lays down the policy with regard to Blacks to preside at the trial of a Black for offences directly connected with the implementation of that policy". The same can be said of magistrates.

Some of the cases discussed in the preceding chapters have shown the effect of policy considerations on sentences in our magistrate's

---

10 (1971) 45 DR at 360

11 Fifth and Final Report - Part B 390

courts. In some cases where strong mitigating factors were present magistrates ignored such factors but emphasised the Legislature's sentencing policy or their sentencing policy. The result was that disturbingly severe sentences were imposed. Although some of those sentences were interfered with on appeal or review the accused had, in some cases, suffered injustice.

As stated in the first chapter, courts are obliged to apply the Legislature's sentencing policies. However the courts are free to formulate their own sentencing policies and principles. Some sentences imposed by magistrates reveal that they experienced difficulty in interpreting the Legislature's policies. By imposing unduly severe sentences they erroneously believed that they were applying the Legislature's sentencing policies. Even after the legislative policy had been interpreted by the Supreme Court some magistrates either misinterpreted or over-emphasized that policy to the detriment of other considerations. Statutory minima (if any) and maxima may, subject to certain cautions, suggest the Legislature's policy regarding the seriousness of the crime.

Judges of the Supreme court played a significant role in the administration of criminal justice by providing guide-lines to magistrates.

The impression has been created in the minds of judges and advocates that magistrates have to do the bidding of their superiors. This is evident from the views expressed earlier. As long as magistrates continue to serve subject to the provisions of the Public Service Act, their judicial independence will be viewed with serious suspicion.

Magistrates will be inclined to impose unduly severe sentences to please their superiors so that their positions and chances of promotion are not jeopardised.

## 2. RECOMMENDATIONS

### 2.1 General note

What has been said about magistrates does not suggest that nothing good can be said about their administration of justice. As stated earlier, some of the sentences discussed are appropriate. According to the Hoexter Commission<sup>12)</sup> the average standard of the criminal justice administered in the district magistrates' courts is satisfactory and in the regional courts it is very good. Mr Justice Milne had this to say about the appointment and promotion of magistrates:

*"There are some very admirable men among our regional magistrates, make no mistake, but between them and the judges differences exist which it would be mealy-mouthed to ignore. Moreover, while no doubt some magistrates can and do resist it, there is insidious pressure built into the promotion system to please those who promote one to higher status and salary."*<sup>13)</sup>

Mr Justice Eksteen<sup>14)</sup> said that he had the greatest respect for our

---

12 Fifth and Final Report, Part A 27

13 at 458

14 at 518

magistrates and for the way in which they performed their duties.

## 2.2 Recommendations of the Hoexter Commission

The Commission's recommendations concerning the Lower Courts included the following:<sup>15)</sup>

- (a) that the performance of judicial work on one hand and the performance of administrative work on the other be separated as soon as possible;
- (b) that soon after the separation has been effected all judicial officers in these courts be made independent of the public service;
- (c) that the appointment, discipline and termination of services of judicial officers in these courts be governed by the recommendations of advisory bodies and that members of such bodies be drawn from the ranks of the said judicial officers themselves;
- (d) that all aspects of the conditions of service of judicial officers in these courts be protected by statute, that their salaries and other benefits of office may not be reduced or curtailed and these be determined from time to time with regard to the recommendations of the Council of Justice;
- (e) that, as part of the process of making judicial officers in these courts independent of the Public Service, steps be taken to recruit judicial officers from all groups in the private sector;
- (f) that a national centre for practical legal training ("*the National Law School*") be established, to be open to members of all racial groups, with a view to the proper staffing of the courts and that the

---

15 Fifth and Final Report, Part A 41

centre should not fall within the Public Service. The centre should provide intensive practical courses in criminal and civil law;

- (g) that the administrative functions which are presently performed by magistrates be assigned to "*resident magistrates*" who shall be public servants and that resident magistrates be conferred with limited jurisdiction to postpone criminal cases, fix bail in unopposed applications in less serious offences, to confirm admissions of guilt and to hear "*petty*" criminal cases;
- (h) that the criminal jurisdiction of resident magistrates be limited to:
  - (i) fines not exceeding the amount permissible in respect of admissions of guilt (R100, according to section 57 of the Criminal Procedure Act),
  - (ii) imprisonment for a period not exceeding one month but excluding a sentence of imprisonment without the option of a fine.
- (i) The commission recommended that proceedings in criminal cases heard by resident magistrates be reviewed by district magistrates;
- (j) that the punitive jurisdiction of the lower courts to impose fines be increased to R30 000 in the case of regional courts and R3 000 in the case of district courts.

If these recommendations are implemented the independence of magistrates will no longer be doubted and government policy considerations will not be the main factor before sentences are imposed. If established, the national centre for practical legal training will serve a very useful purpose - magistrates will receive policy-free training. The quality of justice in the lower courts will be enhanced. It

is hoped that magistrates who will have been trained in terms of the present arrangement will be subjected to the envisaged training.

### 2.3 Recommendations by some lawyers

Mr Justice Milne<sup>16)</sup> said that a fundamental alteration in the training, appointment and conditions of employment of magistrates was needed. The judge said: "*The first necessity is for magistrates to be seen to be as independent as possible*". He suggested that promotion of magistrates be controlled by a panel on which there is at least a number of Supreme Court judges equal to the number of other members of the panel. The judge went on to say that judges were by reason of their function as the appeal and the reviewing court in the best position to judge impartially, apolitically and non-departmentally how well or otherwise magistrates are performing their functions. He said that once magistrates were freed from purely departmental control their independent status would automatically be enhanced:

Mr Justice Dicott said it was arguable whether all civil servants "*tend to do the bidding of their superiors in a conscious effort to enhance their prospects of promotion*". He said that what could not be argued is that there "*is the instinctive and firmly rooted bias in favour of the state inevitably produced by a working life dedicated to the service of its interests and the implementation of its policies*". The judge recommended that magistrates be freed from administrative duties and the Public Service.<sup>17)</sup>

---

16 at 457

17 at 660

Mr Sydney Kentridge also was of the opinion that magistrates be removed from the ordinary discipline and procedures of the public service.<sup>18)</sup>

### 3. AUTHOR'S VIEWS

The views of these leading lawyers reflect a serious defect in our judicial system. This is cause for concern. Magistrates try criminal cases involving the policy of the State. Offences under the Internal Security Act<sup>19)</sup> are tried by our regional courts. Awareness that such offences are considered very serious by the State may cause a magistrate to impose an unduly severe sentence on a convicted person, as a lenient one, he might believe, will not please his superiors. After all his superiors are vested, in terms of the Public Service Act, with powers including the power to recommend his transfer to another region. The transfer may be implemented against his wish. Reports made on him may be unfavourable, thereby prejudicing his chances of promotion or salary increase.

It is not yet known whether or not the recommendations which have been mentioned, will be implemented and when the implementation will take place. Even after the implementation of the recommendations the danger will still be there. The already practising magistrates might still be affected by "*the instinctive and firmly rooted bias in favour of the state*".<sup>20)</sup> Those might, in sentencing, over-emphasize government policy.

---

18 at 654

19 74 of 1982

20 Didcott at 660

As resident magistrates will, if the recommendations are implemented, remain public servants, they will be subject to the conditions presently complained of. The remedy will lie in the review of their proceedings by district magistrates who will not be public servants.

Before the recommendations are implemented, as suggested earlier, seminars attended by magistrates should be held to discuss penalty clauses of new statutory offences. A judge of the Supreme court should be invited to lead discussions at such seminars and to give guide-lines. The seminars should, if possible, be held before new acts come into operation. Although inappropriate sentences are interfered with on appeal or review, accused persons suffer irreparable losses as a result of imprisonment which ought not to have been imposed by trial courts.

The Department of Justice should refrain from issuing directives concerning procedures which magistrates should follow and suggesting sentences. Such directives interfere with the discretion of magistrates. Before the recommendations are implemented the Department of Justice should ensure that magistrates who are appointed to the Bench have received adequate training in sentencing.

Before the recommendations are implemented it would be a step in the right direction to give effect to Mr Justice Milne's suggestion that promotion of magistrates be controlled by a panel on which there is at least a number of Supreme Court judges equal to the number of other members of the panel. Mr Justice Milne correctly pointed out that judges are by reason of their function as appeal and reviewing

court in the best position to judge impartially and non-departmentally how well or otherwise magistrates are performing their functions. Once this suggestion was implemented magistrates would be seen as independent judicial officers. They would not feel that their chances of promotion would be jeopardised if they did not impose sentences that pleased their superiors. In this way justice would be done and would be seen to be done.<sup>21)</sup>

It is trusted that the recommendation that the punitive jurisdiction of the lower courts to impose fines be increased, will be implemented after magistrates have been freed from the Public Service and after the national centre for legal training will be in operation. Magistrates are like operators in industries who should be trained in handling more dangerous yet useful machines, before such machines are introduced into industries. The proposed punitive jurisdiction will be "more dangerous" than the existing one. Its "operators" should therefore be trained to "prevent accidents". An "accident" would include a sentence which has been improperly influenced by government policy.

Sincere thanks should be expressed to our lawyers and the Hoexter Commission who have shown great concern about the quality of justice in our lower courts. It is trusted that the Department of Justice will cause the recommendations to be implemented. It is further trusted that after the implementation of the recommendations magistrates will not be seen as organs of the Government whose task is to promote its policies.

---

21 See also Dlamini, C R M "Courts in a Democratic State with special reference to Magistrates' Courts" to be published in (1985) 9 "Bulletin of the Institute for Public Service and Vocational Training", University of Zululand

It is of vital importance that the public should have confidence in our courts. What has been said clearly shows that some members of the public do not have such confidence in our magistrates. In Gubudela and Others<sup>22)</sup> O'Hagan, J said:

*"It is also clear that persons exercising these judicial functions must not only be impartial in fact but they must do and say nothing which suggests that they have closed their minds to any question in the case."*

Our magistrates will be seen as independent judicial officers. The Hoexter Commission suggested that "... as part of the process of making judicial officers independent of the Public Service, active steps be taken to recruit officers from all racial groups in the private sector".<sup>23)</sup>

Some people believe that a good judicial officer is not necessarily "a good efficient top public servant."<sup>24)</sup> Appointing magistrates from the private sector would build up confidence in the administration of justice. The public have confidence in our judges because they are appointed from the private sector. Hence in his editorial comment in "*De Rebus Procuratoriis*" Mr E Louw said: "Our Supreme Court has unimpeachable reputation for independence from executive-control - not only because of the terms of the Constitution but also because such qualities as independence, objectivity and impartiality form an ingrained part of each judge's nature."<sup>25)</sup> Mr Louw said that this was

---

22 1959 4 SA 93(E) at 95

23 see 2.2(e) of this chapter

24 Mr Justice Milne at 459

25 supra at 359

in a large measure because they are drawn from amongst those who have risen to the top in a highly competitive profession. He said that the profession of advocates is one in which objectivity and independence of thought, knowledge of the law, ability and skill count. He said that these qualities are not acquired suddenly and overnight but they are fused into a person's character only through a lifetime of independent action and thought.

What has been said is sufficient to show that the present conditions of service of our magistrates are unsatisfactory. It is trusted that the Department of Justice will urgently consider and implement the recommendations of the Hoexter Commission.

Dlamini states that "*an independent judiciary is the mark of a maturely democratic state*".<sup>26)</sup> As of all civilised legal systems, the foundation of our legal system is the existence of an independent judiciary.<sup>27)</sup>

It is submitted that it has been clearly shown in this work that government policy considerations influence sentences to the detriment of justice in some magistrates' courts. As long as they remain public servants magistrates will fear to deviate from patterns which will have been set. Their interpretation of legislative sentencing policies and their sentencing policies might be influenced by policies of the executive contained in departmental circulars.

---

26 see footnote 21 of this chapter

27 Kentridge at 654

BIBLIOGRAPHY

- Ashworth A 'Sentencing and Penal Policy' 1983 Weidenfeld and Nicolson, London.
- Beinart B 'Aan sy edele doktor L C Steyn - voorsitter van die Vereniging Hugo De Groot' (1973) 36 'Tydskrif vir Hedendaagse Romeins-Hollandse Reg'.
- Bekker J C 'Rol van die regsprekende gesag in 'n plurale samelewing' - Verslag Pol-21 Human Sciences Research Council, Pretoria 1983.
- Bosman F 'Social Welfare Law' 1982 Lex Patria.
- Burchell E M Milton J R L and Burchell J M 'South African Criminal Law and Procedure' Volume 1 2 ed 1983 Juta and Co, Ltd.
- Cameron E 'Legal Chauvinism, Executive-mindedness - L C Steyn's impact on South African Law' (1982) 99 'South African Law Journal'.
- Didcott J M 'The Didcott Memorandum and Other submissions to the Hoexter Commission' (1980) 97 'South African Law Journal'.
- Dlamini C R M 'Courts in a Democratic State with special reference to Magistrates' Courts' (1985) 9 'Bulletin of the Institute for Public Service and Vocational Training' University of Zululand.
- Du Pre Le Roux and Botha (initials not given) 'The Incidence of dagga use in the Cape Peninsula' (unpublished).

Du Toit E 'Straf in Suid-Afrika' 1 ed 1981 Juta & Co.Ltd.

Dworkin R 'Taking rights seriously' 1977 Duckworth & Co.Ltd, London.

Eksteen J P G 'From the address by the Honourable J P G Eksteen to the East London Attorneys' Association' (1971) 88 'South African Law Journal'.

Ferreira J C 'Strafprosesreg in die laer howe' 2 ed 1979 Juta & Co, Ltd.

Forst M L 'Sentencing Reform: Experiments in Reducing Disparity' 1982 Sage Publications Beverly Hills/London/New Delhi.

Gordon G 'Judges and Justice' (1981) January 'South African Outlook'.

Harcourt A B 'Swift's Law of Criminal Procedure' 2ed 1969 Durban Butterworths.

Hart H L A 'Law, Liberty and Morality' 1963 Oxford University Press.

Hiemstra V G 'Suid-Afrikaanse Strafproses' 3ed 1981 Durban Butterworths.

Jennings W I 'The Law and the Constitution' 5 ed 1959 University of London Press Ltd.

Jennings W I 'The British Constitution' 4 ed 1962 Cambridge University Press.

Kahn E 'Appointment of Magistrates as Judges' (1971) 88 'South African Law Journal'.

Kentridge S 'Telling the truth about law' (1982) 99 'South African Law Journal'.

Leon R N 'Opening Remarks' published in 'Criminal Justice in South Africa' edited by Olmesdahl M C J and Steytler N C 1983 Juta & Company Limited.

'The Living Bible'. British ed. 1974 Hazel Watson & Viney, Ltd, Aylesbury, Bucks.

Louw E 'Editorial Comment' (1971) 4 'De Rebus Procuratoriis'.

Lund J R 'Discretion, Principle and Precedent in Sentencing' Part II (1980) 4 'The South African Journal of Criminal Law and Criminology'.

Milne A J 'Speech by the Honourable Mr A J Milne to the Natal Law Society' (1980) 97 'South African Law Journal'.

Oberholzer J N 'Press statement by the Secretary for Justice, Mr J N Oberholzer of 25-6 August' (1971) 88 'South African Law Journal'.

Rabie M A and Strauss S A 'Punishment - an introduction to Principles'. 3ed 1981 Durban Butterworths.

Schankula (initials not given) 'Dagga: Facts and Fiction' (unpublished).

Teggin (initials not given) 'Cannabis abuse by psychotic patients'  
(unpublished).

Thomas D A 'Principles of Sentencing' 2ed 1979 Heineman, London.

Tresolini R J and Shapiro M 'American Constitutional Law' 3ed 1971 The  
Mac Millan Company Collier - Mac Millan Limited, London.

Van S D'Oliveira J A 'Corporal punishment as an alternative to, or in  
Part-Commutation of, a sentence of imprisonment' (1983) 18 'The  
Magistrate/Die Landdros'.

Volbrecht W M 'Die Daggaprobleem: Psigologiese, Fisiologiese en  
Maatskaplike Effekte' Deel 1 (1977) 1 'The South African Journal  
of Criminal Law and Criminology.

Wacks R 'Judges and Injustices' (1984) 101 'South African Law Journal'.

LIST OF CASESA

A and Another 1959 3 SA 16 (CPD)

Allart 1984 2 SA 722 (TPD)

B

B 1965 3 SA 17(E)

Batshise 1981 1 SA 966 (AD)

C

Chiloana 1962 4 SA 567 (TPD)

D

D 1960 1 SA 151 (CPD)

E

E and Another 1960 4 SA 445 (CPD)

E 1966 2 SA 339 (NPD)

E 1967 3 SA 500 (NPD)

Erasmus 1976 3 SA 131 (OPD)

G

Gubudela and Others 1959 4 SA 93 (E)

Gibson 1974 4 SA 478 (AD)

HH and Another 1959 1 SA 803 (TPD)H 1959 3 SA 583 (CPD)Hemley en n Ander 1960 1 SA 397 (GWLD)H 1977 2 SA 594 (AD)Harvey 1977 2 SA 185 (OPD)Huma 1983 1 SA 40 (AD)II 1968 2 SA 268 (CPD)JJ 1958 4 SA 488 (AD)Jacob en n Ander 1959 2 SA 269 (GWLD)Joelson 1971 2 SA 135 (RAD)Jansen and Another 1975 1 SA 425 (AD)Jantjies 1978 1 SA 1048 (E)Johnson 1980 3 SA 188 (CPD)KK 1961 2 SA 381 (TPD)Kumalo and Others 1965 4 SA 565 (N)Kamfer 1969 4 SA 250 (C)Kroutz en Andere 1972 2 SA 918 (CPD)Kukarie en Andere 1972 2 SA 907 (O)Kumalo 1973 3 SA 697 (AD)Khulu 1975 2 SA 518 (NPD)Khumalo and Others 1983 2 SA 650 (NPD)

L

L 1960 3 SA 503 (AD)

M

Moqena 1943 OPD 61

Mkwanazi 1960 2 SA 248 (NPD)

Manho 1960 3 SA 200 (CPD)

Mabisela 1960 4 SA 117 (TPD)

Madlala 1968 1 SA 329 (NPD)

Melebo en 'n Ander 1972 2 SA 751 (OPD)

Mphuthi 1972 2 SA 645 (OPD)

Mamase and Others 1972 2 SA 765 (E)

Maseko and Others 1972 3 SA 348 (TPD)

Mofokeng 1973 2 SA 89 (OPD)

Mateus 1973 4 SA 54 (SWA)

M 1977 3 SA 379 (CPD)

M 1979 2 SA 25 (AD)

Mthetheleli 1979 2 PH H 166

Mateisi 1981 2 SA 368 (OPD)

M 1982 1 SA 240 (N)

N

Ndhlovu 1961 2 SA 637 (NPD)

Nkubo en 'n Ander 1972 1 SA 266 (OPD)

Nkosi en Andere 1972 2 SA 753 (TPD)

O

O and Another 1959 3 SA 16 (OPD)

R

R 1971 3 SA 787 (CPD)

Radebe 1973 1 SA 796 (AD)

Ruiter en 'n Ander, Beyers en Andere, Louw en 'n Ander 1975 3 SA 526 (C)

Reddy 1975 3 SA 757 (AD)

S

S 1965 4 SA 405 (NPD)

Shangase and Others 1972 2 SA 410 (NPD)

Strauss 1973 2 SA 84 (OPD)

Scheepers 1977 2 SA 154 (AD)

Setnoboko 1981 3 SA 553 (OPD)

T

Tanbiga 1965 1 SA 257 (SR)

Tshawana 1969 2 SA 252 (E)

V

V 1968 4 SA 262 (NPD)

Victor 1970 1 SA 427 (AD)

W

W en 'n Ander 1959 2 SA 179 (CPD)

W 1970 3 SA 346 (NPD)

Z

Zinn 1969 2 SA 537 (AD)

REPORTS

Hansard 14 February, 1957, 2 February 1959, 5 May 1971, 14 April 1983,  
14 June 1983.

Report of the Commission of Inquiry into the Structure and Functioning  
of the Courts (the Hoexter Commission report) R P 78/1983 (Parts A and  
B).

Report of the Commission of Inquiry into the Penal System of the Republic  
of South Africa (the Viljoen Commission Report) RP 78/1976.

The Second Interim Report of the Commission of Inquiry into the Structure  
and Functioning of the Courts (the Hoexter Commission Report ) RP 35/1981.