

IN THE HIGH COURT OF SOUTH AFRICA**PORT ELIZABETH, EASTERN CAPE**

Review no.: 120050

CA&R NO.: /2012

Date delivered: 23 May 2012

In the matter between:

THE STATE

And

DARUIS GERBER

REVIEW JUDGMENT

DAMBUZA J.

[1] This matter comes before me on special review from the magistrate, Port Elizabeth. In the referral letter the magistrate states that the sentence imposed on the accused is incompetent and suggests that the sentence imposed be set aside and that either a fresh sentence be imposed or that the matter be remitted to the magistrate for sentence to be considered afresh. A further issue which according to the magistrate, is a cause for the referral, is that no inquiry was held, in the court *a quo*, in terms of Section 103 of Act 60 of 2000.

[2] The accused was convicted, on a plea of guilty to dealing in dagga. He was then sentenced as follows: “ *Beskuldigde gevonnis word to R5 000-00 (vyf duisend) of 5 (vyf) maande gevangenisstraf en daarbenewens tot ‘n verdere 6 (ses) maande*

gevangenisstraf. Die laaste gedeelte word opgeskort vir 'n tydperk van vyf (5) jaar op voorwaarde dat die bekuldigde nie skuldig bevind word aan O/Artikel 5 (b) Wet 140 van 1992 (Handel in dwelms) wat gepleeg is gedurende tydperk van opskorting nie.”

[3] The magistrate suggest that the sentence imposed is incompetent because the first portion thereof imposes a fine with an alternative of imprisonment AND ONLY THEREAFTER a sentence of a term of imprisonment is imposed. According to the magistrate the court in **S v Mohome**¹ held that “*(die hof (moes) eers die gevangenisstraf opgele het.*”

[4] I do not agree. Firstly Section 17 (e) of the Act provides that a person convicted of dealing in dangerous dependence producing substance² shall be liable: “*to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.*”

[5] The sentence therefore complies with the provisions of Section 17 (e) of the Act in that a term of imprisonment (though suspended) has been imposed. What the court held in **S v Mohome**, to which the magistrate refers is only that upon a conviction for dealing in drugs, in addition to any fine with alternative imprisonment which may be imposed, a further term of imprisonment, suspended or unsuspended and without an alternative of a fine, must always be imposed. In the words of Smit J in Mohome: “*benewens enige boete met alternatiewe gevangenisstraf wat opgele mag word daar altyd 'n verdere termyn gevangenisstraf met of sonder opskorting en sonder die keuse van 'n boete opgele moet word.*” That is what has been done in this case.

1 (1993 (1) SACR 504T)

2 (Contravention of S5 (b) of the Act.)

[6] I do agree that in as far as the provisions of section 103 of Act 60 of 2000 were never brought to the attention of the accused, the proceedings before the court *a quo* were not in according with justice and that the matter has to be remitted to the magistrate for an inquiry to be held accordingly.

Consequently:

- 1) The conviction and sentence are confirmed.
- 2) The record is remitted to the magistrates court for the provisions of Section 103 of Act 60 of 2000 to be complied with.

N. DAMBUZA
JUDGE OF THE HIGH COURT

I agree,

J.W EKSTEEN
JUDGE OF THE HIGH COURT

