



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

HIGH COURT REF NO: R17/2022

MAGISTRATE CASE NO. E14/2022

MAGISTRATE REFERENCE NO. L14/2022

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

30 November 2022
DATE


.....
SIGNATURE

In the matter between:

THE STATE

And

PHUMULANI MAGAGULA

(THE ACCUSED)

REVIEW JUDGMENT

RATSHIBVUMO J

[1]. The accused, a 21-year old man appeared in Barberton Magistrate Court sitting in Low Creek facing two criminal offences. In count 1, it was alleged that he contravened section 5(b) of the Drugs and Drug Trafficking Act, no. 140 of 1992 – the Drugs Act (dealing in 2,5 kilograms of dagga, an undesirable dependence producing substance). In count no 2, it was alleged that he contravened section 49(1)(a) of the Immigration Act, no. 13 of 2002 (entering or remaining in the Republic without a valid document or passport).

[2]. On 27 January 2022, the accused pleaded guilty to all the charges and was convicted on his plea. He was sentenced on the same day as follows:

“Count 1: Accused is sentenced to pay a fine of R3 000.00 (three thousand rand) or undergo 12 (twelve) months imprisonment, half suspended for a period of 05 (five) years on condition that accused is not convicted of contravening the provisions of section 5(b) read with the sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act, no. 140 of 1992.

Accused is further sentenced to pay a fine of R1 500 (one thousand rand five hundred rand) or undergo 03 (three) months imprisonment suspended for a period of 03 (three) years on condition that accused is not convicted of contravening the provisions of section 5(b) read with the sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act, no. 140 of 1992 – Dealing in drugs.

Count 2: Accused is sentenced to pay a fine of R5 000.00 (five thousand rand) or undergo 06 (six) months imprisonment suspended for a period of 03 (three) years on condition accused is not convicted of contravening the provisions of section 49(1)(a) read with sections 1, 9, 10, 10A, 10B, 25 of the Immigration Act, no. 13 of 2002, committed during the period of suspension.”

In terms of section 35 of the Criminal Procedure Act 51 of 1977 – Dagga is forfeited to the State.”

[3]. This matter came to the attention of Senior Magistrate De Beer who was of a view that the sentence imposed in respect of count 1 was incompetent. He immediately sent the case on special review as provided in section 304(4) of

the Criminal Procedure Act, no. 51 of 1977. It is not clear as to when the matter was sent on review as his covering letter is undated. It is however apparent that his view was based on the provisions of section 17(e) of the Drugs Act which, as he interpreted, has no room for the imposition of a fine as a sentence unless it is imposed alongside a sentence of imprisonment without an option of a fine.

[4]. Section 17(e) of the Drugs Act provides as follows,

“Any person who is convicted of an offence under this Act shall be liable –

(e) in the case of an offence referred to in section 13 (f) (contravention of a provision of section 5 (b)), 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.” [My emphasis].

[5]. The above provision has been the subject of interpretation by various divisions of the High Courts in a number of judgments. Senior Magistrate De Beer referred to the judgment of *S v Mohome*¹ where the High Court in interpreting the penalty clause provided for contravening s 2(a) of Act 41 of 1971 (dealing in drugs under the predecessor to the Drugs Act) said, “upon a conviction for dealing in dagga in contravention of s 2(a) of Act 41 of 1971, in addition to any fine with alternative imprisonment which may be imposed, a further term of imprisonment suspended or unsuspended and without the alternative of a fine must always be imposed.”

[6]. This interpretation has been followed with approval in a number of judgments such as *S v Mqikela*,² *S v Mlambo*³ and *S v Madibane*.⁴ In all these cases, sentences where a fine was imposed were set aside and replaced with sentences of imprisonment without an option of a fine, irrespective of whether

¹ 1993 (1) SACR 504 (T)

² 2005 (2) SACR 397 (E)

³ 2007 (1) SACR 664 (W)

⁴ 2014 (2) SACR 88 (GP)

such sentences were fully suspended, partially suspended or not suspended at all.

[7]. Office of the Director of Public Prosecutions (the DPP), Mpumalanga was asked to make remarks or submissions regarding the views expressed by the Senior Magistrate as contained in the covering letter. The court is indebted to Adv Mpolweni the Deputy Director of Public Prosecutions, together with Adv Mata who penned an opinion which was relevant and of great help. The DPP agrees with Senior Magistrate De Beer in concluding that the sentence imposed in respect of count 1 above was incompetent.

[8]. The DPP however referred this court to a number of decisions in which some divisions of the High Court had confirmed or imposed the sentences of a fine with imprisonment only as an alternative thereof in respect of a similar offence.⁵ The DPP argues that these cases were wrongly decided and attributed this to “the wording of the section which is somehow perplexed and ambiguous and as a result, it is often misconstrued.” I agree with the DPP that these judgments were wrongly decided.

[9]. I am however reluctant to join in the choir critical of the legislative framework and the wording of section 17(e) of the Drugs Act. It is my respectful view that section 17(e) is unambiguous in its current format. In case I am wrong in this regard, the law reports are replete with authorities in which this section was interpreted by various divisions of the High Court. I have however noted that all the judgments referred to above by the DPP as having been wrongly decided, did not deal with the interpretation of section 17(e) of the Drugs Act nor was anything regarding the competency of the sentences imposed brought to the attention of the courts reviewing the proceedings. Had this been brought to their attention, I have no doubt that the correct

⁵ See for example, *S v Fedani* 2000 (1) SACR 345 (E), *S v Mahlangu* 2004 (1) SACR 280 (T) and *S v Sokweliti* 2002 (1) SACR 632 (Tk).

interpretation of this section would have been reached. This should however not be interpreted as condonation for not considering all issues before the courts reviewing proceedings from the Lower Courts.

[10]. Before the DPP's office was requested to submit its views, the Magistrate who presided over the trial was implored to obtain submissions from the accused, so as to afford him active participation in the review proceedings in light of the real possibility that the sentence imposed on him could be set aside and replaced with one of direct imprisonment. This was also in line with the principle of natural justice that requires both sides to be heard before the suspect's fate is determined (the so called *audi*). In response was brought to the court's attention that the accused paid a fine of R1 483.42 on 28 January 2022 and was deported to his country of origin. In light of the charge in count 2, this did not come as a surprise.

[11]. The DPP also weighed in and roped in the services of the Investigating Officer in this case who gave a similar report. The result was that the accused could not be traced. The DPP submitted that the court should proceed and alter the sentence irrespective of the absence of the accused, so as to correct the incompetent sentence imposed in this case. It was also submitted that the accused would not suffer substantial prejudice as his submissions in mitigation for the sentence are on record. Moreover, the DPP requested that a custodial sentence that is wholly suspended should be imposed. I agree with these submissions.

[12]. The DPP also requested that the court should consider an order directing that a fine paid by the accused should be refunded back to him. My concern with this submission is over the practicality in light of the information to the effect that he has since been deported to his country of origin and the possible expense associated with tracing there. I do not think this is necessary and warranted.

[13]. I therefore propose the following order.

[12.1] The conviction in respect of the two charges is confirmed.

[12.2] The sentence imposed in respect of count 1 is set aside and replaced with the following:

[12.2.1] The accused is sentenced to a fine of R1 483.42 (one thousand four hundred and eighty-three, forty-two cents. A further 12 (twelve) months imprisonment is imposed but suspended for a period of 03 (three) years on condition that accused is not convicted of contravening section 5(b) of the Drugs and Drug Trafficking Act, no. 140 of 1992, committed during the period of suspension.

[12.3] The sentence imposed in respect of count 2 is confirmed.

[12.4] The sentences above are antedated to 27 January 2022.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree



D GREYLING-COETZER
ACTING JUDGE OF THE HIGH COURT
30 NOVEMBER 2022