

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No: 67/2013

In the review of:

THE STATE

and

MOEKO RAMONE

CORAM: KRUGER *et* MOLOI , JJ

JUDGMENT BY: KRUGER, J

DELIVERED ON: 27 JUNE 2013

[1] This is a review judgment. The accused, a 25 year old unemployed Lesotho citizen, pleaded guilty to and was convicted of dealing in 12 kg dagga in the magistrates' court at Ladybrand.

[2] The magistrate imposed the following sentence:

"ACCUSED IS SENTENCE TO PAY A FINE OF R3 000-00
(THREE THOUSAND RAND) OR TO UNDERGO 9 (NINE)

MONTHS' OF IMPRISONMENT. FURTHERMORE TO PAY A FINE OF R3 000-00 (THREE THOUSAND RAND) OR TO UNDERGO 9 (NINE) MONTHS' OF IMPRISONMENT WHOLLY SUSPENDED FOR 5 (FIVE) YEARS ON CONDITION HE IS NOT CONVICTED OF POSSESSION OR DEALING IN DRUGS DURING THE PERIOD OF SUSPENSION."

[3] In an attempt to make sense of this sentence it can be abbreviated as follows:

- (i) R3 000 fine or 9 month's imprisonment
plus
- (ii) R3 000 or 9 month's imprisonment wholly suspended.

[4] Formulated in a more comprehensible manner, the sentence imposed by the magistrate would read:

"A fine of R6 000 or 18 months' imprisonment, half of which is suspended..."

Had the magistrate formulated his sentence in this manner, he might have seen that his sentence did not comply with section 17(e) of Act 140 of 1992.

[6] I addressed the following enquiry to the magistrate:

“1. Does the sentence comply with section 17(e) of Act 140 of 1992? See Terblanche, *Guide to Sentencing in South Africa* 2nd Ed (2007) at 36 par 4.3.10 and *S v Mazibuko* 1992 (2) SACR 320 (W) at 323a and *S v Xaba and Another* 2005 (1) SACR 435 (SCA) par [12]. Does the section not require that imprisonment without the option of a fine be imposed?”

[7] The magistrate responded that his sentence is in order. He misses the crucial distinction between the word “or”, and the word “and” which is used in section 17(e) of the Drugs and Drug Trafficking Act 140 of 1992, which reads as follows:

“(e) in the case of an offence referred to in section 13 (f), 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.”

The word “both” used in section 17(e) is important. “Both” does not mean “alternatively”. “Both” means in addition to, not “or”. “The one and the other (and not just one)” **Shorter Oxford English Dictionary**.

- [8] Let me spell out the meaning of section 17(e) clearly. If an accused has been convicted of dealing in drugs, imprisonment without the option of a fine must be imposed. The court can suspend that imprisonment. What the court cannot do is to give the alternative of a fine to that imprisonment. To use a simple example, where both a fine and imprisonment are imposed, such sentence would read as follows:

“The accused is sentenced to undergo imprisonment for 5 years. In addition to this, the accused is ordered to pay a fine of R10 000.”

- [9] The fine is, in the wording of section 17(e), not an alternative to the imprisonment, it is imposed in addition to the imprisonment. The magistrate might know that many statutory penalty provisions state that the maximum penalty for an offence is a certain term of imprisonment, or a stated maximum fine, or both such fine and imprisonment. **Terblanche, Guide to Sentencing in South Africa** 2nd Ed (2007) explains this penalty clause in para 4.3.10 at page 36:

“4.3.10 *Imprisonment, or a fine and imprisonment*

The Drugs and Drug Trafficking Act contains yet another kind of penalty clause in section 17(e), providing for

‘imprisonment for a period not exceeding twenty five years, or to both such imprisonment and such fine as the court may deem fit to impose’.

In this case imprisonment has to be imposed, although it may be partly or totally suspended. The court may, in its own discretion, add a fine of any amount it chooses.”

The point is that the court must impose imprisonment. It can add (Not as an alternative) a fine.

[10] The sentence which the magistrate imposed is incompetent and must be replaced with a correct sentence. The alternative fine in the second part of the sentence must be deleted.

[11] A further problem with the sentence relates to the condition of suspension. If a sentence is suspended in whole or in part, the condition of suspension must be the commission of the offence in the suspended period, not a further conviction in the suspended period. It is the conduct during the period which is

important, not the ultimate finding that the individual committed the prohibited act. The reference should be to the date of the commission of the offence, not to the date of conviction, as the sentence imposed by the magistrate reads.

[12] **ORDER:**

1. The conviction is confirmed.
2. The sentence imposed by the magistrate is set aside and replaced with the following:

“The accused is sentenced to a fine of R3 000 or 9 months’ imprisonment. In addition the accused is sentenced to 9 months’ imprisonment, wholly suspended for five years on condition that he is not convicted of a contravention of section 5(b) or 4(b) of Act 140 of 1992, committed during the period of suspension.”

3. The accused is not declared unfit to possess a firearm under section 103(1) of Act 60 of 2000.

4. This sentence is deemed to have been imposed on 10 January 2013.

A. KRUGER, J

I agree.

K. J. MOLOI, J