

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 103/2012

In the review between:-

THE STATE

and

GIFT MATHE

CORAM: JORDAAN, J *et* DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED: 31 MAY 2012

[1] On 6 February 2012 the accused was convicted of possession of 77 grams of dagga in contravention of section 4(b) of the Drugs and Drug Trafficking Act, 140 of 1992 and sentenced to payment of a fine of R5 000,00 or 6 (six) months' imprisonment. The accused was declared unfit to possess a firearm in accordance with the provisions of section 103(1) of the Firearms Control Act, 60 of 2000.

[2] On 15 May 2012 when the matter originally came before me on automatic review I immediately directed two queries to the learned magistrate. Firstly, an irrelevant record was attached

which had to be rectified. Secondly, it was my *prima facie* view based on the information that was provided to me that the sentence was excessive insofar as accused is a first offender, the type of offence – possession and not dealing – and the relatively small amount of dagga.

[3] On 25 May 2012 I received the learned magistrate's comments together with a record of the correct proceedings, although to a large extent nonsensical, probably due to faulty recording devices.

[4] The learned magistrate reported as follows pertaining to my suggestion that the sentence was excessive.

"The sentence imposed should be looked at together with the circumstances under which the offence was committed though I admit that indeed the sentence is EXCESSIVE for a normal first time offender, and a mere possession of dagga weighing 77 grams. In this case accused was arrested in court building bringing dagga to a person, an arrested person or a trial awaiting inmate in court 20."

[5] I considered this with those parts of the record that made sense

and decided to immediately order the release of the accused who could not pay the R5 000,00 and has been incarcerated from 6 February 2012, i.e. for a period of nearly four months. I indicated in my order that my written judgment would follow.

[6] The accused is 26 years old, a first offender with no dependants. He does part-time jobs and earns R850,00 every fortnight. He smokes dagga twice a day. He accompanied a friend, who apparently wanted to show some moral support to a friend of his who had to appear in the Bloemfontein Magistrates' Court. He was arrested when he tried to enter the court building and just after being screened at the security gates. Dagga which he concealed inside his shoes was found. This occurred on 3 February 2012 and three days later he appeared before court when he pleaded guilty, was convicted and sentenced.

[7] The accused apologised to the court in mitigation. The learned magistrate relied upon the information tendered by the prosecutor just before sentence to the effect that when the accused was arrested, he alleged to the person that arrested

him that he was taking the dagga to a person in court 20, but that he refused to identify this person. This version of the prosecutor was denied by the accused, who informed the court that he mentioned that he was indeed on his way to court 20, but that he never said that it was his intention to deliver the dagga to a person in court 20.

[8] The learned magistrate committed a material misdirection in accepting this hearsay version and in imposing such a heavy sentence as a consequence which he admits to be excessive in normal circumstances, was it not for the aforesaid finding. In any event the sentence is so excessive that it should be revisited.

[9] The sentence imposed is higher than sentences that are often imposed for dealing in dagga. See **S v GCOBA** 2011 (2) SACR 231 (KZP) where a fine of R4 000,00 or 12 (twelve) months' imprisonment was imposed and a further 5 (five) years' imprisonment suspended for a period of 3 (three) years. In **S v FEDANI** 2000 (1) SACR 345 (E) the accused was sentenced for dealing in 83 grams of dagga to R3 000,00 or 12 (twelve)

months' imprisonment, half of which was suspended for 5 (five) years on normal conditions.

- [10] In the following judgments lesser sentences than *in casu* were imposed notwithstanding the fact that the accused in each of these cases were found in possession of higher quantities of dagga. In **S v MBATHA** 2000 (2) SACR 409 (W) the accused was found in possession of 100 kilograms of dagga and sentenced to R3 000,00 or 12 (twelve) months' imprisonment and a further 12 (twelve) months' imprisonment was suspended for 5 (five) years on certain conditions. In **S v MOTSIAWEDI** 1993 (1) SACR 306 (W) an accused found in possession of one kilogram of dagga was sentenced to R2 000,00 or 6 (six) months' imprisonment of which one half was suspended for 3 (three) years on certain conditions. In **S v MOOROSI** 1999 (1) SACR 336 (O) an accused found in possession of 100 kilograms of dagga was sentenced to R3 000,00 or 9 (nine) months' imprisonment plus 6 (six) months' imprisonment suspended for 4 (four) years on certain conditions. In **S v KOLOBE** 2006 (1) SACR 118 (O) this court accepted that a

fine of R1 600,00 or 8 (eight) months' imprisonment for possession of dagga (the quantity not appearing from the judgment), was in order. I have taken note of the parameters regarded as proper sentences in the Free State High Court and it appears as if sentences for possession of dagga varying from R600,00 or 2 (two) months' imprisonment to R1 800,00 or 9 (nine) months' imprisonment appear to be a reasonable norm in respect of first offenders.

- [11] I accept that the place where dagga is possessed, e.g. in prison or on a school playground or at court as *in casu* may be an aggravating factor, but even so the penalty meted out remains excessive. Taking into consideration the factors referred to herein and excluding the hearsay evidence of the prosecutor that the dagga was intended for another person in court 20, an appropriate sentence is R1 200,00 or 3 (three) months' imprisonment. Such a sentence would probably allow the accused to pay the fine in order to avoid committal to a correctional centre. As it turns out it was not possible for him to pay the excessive fine of R5 000,00.

[12] The learned magistrate declared the accused unfit to possess a firearm in terms of section 103 of the Firearms Control Act, 60 of 2000. There is no indication on the record that the learned magistrate enquired from the accused why he should not be declared unfit to possess a firearm. More importantly, the learned magistrate did not consider the judgment of this court in **S v KOLOBE**, *loc cit*, where it was found that such an order cannot be made in the event of an accused found guilty of possession of dagga. There is no indication that the accused abuses dagga and he was also not convicted of such an offence. See section 103(1)j. In section 103(1)(k) provision is made for a declaratory order to be made in the event of the accused being found guilty of dealing in dagga (and not mere possession). Therefore this order should also be set aside.

[13] Consequently the following orders do issue:

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

The accused is sentenced to a fine of R1 200,00 or 3

8

(three) months' imprisonment, the sentence to be ante-dated to 6 February 2012.

3. The order declaring the accused to be unfit to possess a firearm is set aside.

J.P. DAFFUE, J

I concur.

A.F. JORDAAN, J

/sp