

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 262/2012

In the review between:-

THE STATE

versus

MODIKOE MODIKOE

CORAM: DAFFUE, J *et* THAMAGE, AJ

JUDGMENT BY: THAMAGE, AJ

DELIVERED ON: 29 NOVEMBER 2012

- [1] This is a review matter in terms of section 302 of the Criminal Procedure Act 51 of 1977 as amended.
- [2] Accused was convicted and sentenced in the Witsieshoek Magistrates' Court held at Tseseng on a charge of contravention of section 4(b) reading with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 (possession of drugs). He was sentenced to R10 000,00 (ten thousand rand), in default, to undergo 10 (ten) months imprisonment, half of the sentence is suspended for

5 (five) years on condition that accused is not found guilty of possession of drugs committed during the period of suspension.

- [3] The matter was forwarded to this court on automatic review. The reviewing judge referred the matter back to the presiding magistrate with the following query:

- “1. Reasons for sentence are requested, in particular;
 - a) whether a fine of ten thousand Rand R10 000.00; or even the unsuspended amount of five thousand Rand (R5000.00), was in view of the accused's financial position realistic at all.
 - b) why was such a severe fine considered appropriate?
2. The J4- form does not indicate whether the fine was paid, the accused released or not. That must be done.”

- [4] The presiding magistrate response was as follows:

- “1. The record resubmitted to the Honourable Justice.
2. I wish to respond as follows to the Honourable Judge's queries:-
 - (a) Whether a fine of ten thousand rand (R10 000.00) or even the unsuspended amount of five thousand

rand (R5000.00) was in view of the accused's financial position realistic at all.

(b) Why such a severe fine was considered appropriate?

I will deal with the Honourable Judge's queries all at once.

During the sentence I considered the following circumstances aggravating in the circumstances of this case:-

- (i) Accused is a Lesotho citizen.
- (ii) He travelled from his own country and got into South Africa with dagga.
- (iii) He was convicted of possession of dagga but on his own admission that he was sent from his own country to deliver dagga in South Africa and was to be remunerated. This borders dealing in drugs. It can also be inferred that this was organized crime and well planned making it very serious.
- (iv) He was found in possession of a large quantity of dagga (16,3 Kg).
- (v) It is no exaggeration to state that possession and use of dagga is prevalent in this district. It is becoming a norm for Lesotho citizens to gain access in South Africa via villages falling in the court's jurisdiction carrying large amount of dagga. I submit that in the circumstances I properly exercised my discretion and reasoning on sentencing accused.

I also requested the Clerk of the Court to enquire from prison if accused is still serving, accused served until 07/05/2012 when he was released and handed over to the Home Affairs for deportation back to his country.

Furthermore it is unfortunate that I am unable to conduct a proper research on the subject. We do not have a library on the office and have been without a computer for almost two (2) years and as such unable to conduct an online research.

I thank the Honourable Judge.”

- [5] The magistrate’s response was submitted to me to review the proceedings as to whether they were in accordance with justice. I invited the Deputy Director of Public Prosecutions to provide inputs and/or submissions. I am deeply indebted to Advocate Ferreira and Advocate Hiemstra for their well thought and valuable submissions.
- [6] Accused pleaded guilty to the charge preferred against him. He was unrepresented and the magistrate proceeded in terms of section 112(1)(b) of the Criminal Procedure Act 1977, Act 51 of 1977. He admitted all the elements of the offence. He was thus convicted as charged.

- [7] In mitigation of sentence, he informed the court that he was sent to deliver dagga in the Republic of South Africa. He resides with his blind mother and also takes care of his brother's minor child. His father has passed away. He is making a living by doing odd jobs as cattle herd boy and earns R300.00 per month. He is in a position to pay R100.00 fine.
- [8] The primary purpose of imposing a fine as an alternative measure of punishment is to afford an accused person an opportunity to stay out of prison, hence the fine should be commensurate with an accused financial means.
- [9] I find no problem with the imprisonment term, having considered the reasons advanced by the magistrate. There is however an imbalance in the proportionality between the fine and the imprisonment with due regard to accused financial position and earning capacity.
- [10] In **S v DONGOLA** (1594/2004) [2004] ZAFSHC (2 December) the accused was convicted of possession of 11 kilograms of dagga (section 4(b) of Act 140 of 1992) and

sentenced by the magistrate to R4 000.00 or 8 (eight) months imprisonment and a further 12 (twelve) months imprisonment wholly suspended for a period of 5 (five) years. On review the court set aside the sentence and substituted it with R1 200.00 or 4 (four) months imprisonment.

[11] I am mindful of the devaluation of money and taking also into consideration inflation. In another decision of this division namely **S v MOKHEEA** (1075/2004) [2004] ZAFSHC 92 (7 October 2004) the accused was sentenced to R3 000.00 or 6 (six) months imprisonment and a further 12 (twelve) months suspended for a period of 5 (five) years for contravention of section 4(b) of Act 140 of 1992. The quantity of dagga was 7.6 kg. On review, the sentence was set aside and replaced with a sentence of R750.00 or 3 (three) months imprisonment.

[12] In respect of the present case, the quantity of dagga is 16.3 kg which is more than double the amount in **S v MOKHEEA**, *supra*. I am mindful of the fact that sentencing is discretionary which discretion should be exercised judicially and further that sentence should be individualised.

[13] The court should thus consider the personal circumstances of the accused, the seriousness of the offence, as well as the interest of the society when determining an appropriate sentence. See **S v RABIE** 1975 (4) SA 855 (A). The financial position of the accused is one of the factors that falls under personal circumstances of the accused.

[14] Imposition of a fine is thus a way of telling the accused that he can avoid going to prison by paying money in lieu of imprisonment. The fine in this regard is clearly beyond the financial means of the accused which renders it tantamount to an imprisonment without the option of the fine.

[15] In the circumstances I am of the view that the fine imposed by the magistrate is inappropriate and a fair and reasonable amount would be R3 000.00 half of which is suspended for a period of 5 (five) years. Like I indicated before, I do not have any problems with the imprisonment term imposed.

[16] Accused is already released from prison, he was released on the 7th May 2012 and most probably he is in Lesotho. From the response of the magistrate it seems the accused did not

pay the fine. The reduction of the fine would be a technical adjustment and the accused will in no way be prejudiced. To summon the accused to court for resentencing will be a cumbersome exercise more so that he is a Lesotho citizen.

[17] I fully agree with judgment of my colleague Moloi J in **S v THORISO** 2011 JDR 0924 (FB) and I quote:

“In this case the practicalities do not permit such remission because the accused is a Lesotho citizen whose address is difficult to determine... The state will have difficulty in finding a person in such circumstances as the logistics of entering a foreign country and searching for a person there as well as the costs and time will be prohibitive... but justice will be better served by bringing closure to future criminal litigation.”

[18] In the circumstances, the following order is made:

18.1 Conviction is confirmed.

18.2 The sentence is set aside and substituted with the following sentence:

A fine of R3 000.00 (three thousand rand) or 10 (ten) months imprisonment of which half of the sentence is suspended for a period of 5 (five) years on condition

that accused is not convicted of contravention of section 4(b) of Drugs and Drug Trafficking Act 140 of 1992 committed during the period of suspension.

S.J. THAMAGE, AJ

I concur.

J.P. DAFFUE, J

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