

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 232/08

In the review case between:-

THE STATE

and

MABOFOKENG NTELEKI

CORAM: VAN DER MERWE, J et VAN ZYL, J

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 29 MAY 2008

[1] The accused was charged with the offence of contravention of section 5(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992, in that she allegedly dealt in 2,05kg of dagga. She pleaded guilty, whereupon she was rightly convicted as charged. The accused was sentenced to a fine of R1 500,00 or 3 months imprisonment, wholly suspended for 5 years on condition that she is not again convicted of contravention of section 5(b) of Act 40 of 1992 committed during the period of suspension.

[2] The matter was then sent on special review in terms of section 304(4) of the Criminal Procedure Act, No. 51 of 1977. The magistrate, in her referral letter, referred to the provisions of section 17(e) of Act 140 of 1992 on the basis

of which she stated that the imposed sentence is an incompetent sentence and that she therefore requests that the sentence be set aside and that the matter be remitted to the court *a quo* for the imposition of a proper sentence.

[3] Section 17(e) of Act 140 of 1992, which is the relevant penalty clause, reads as follows:

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

It therefore compels a court to impose a sentence of imprisonment without the option of a fine (although it may be wholly or partly suspended), with or without a fine and alternative imprisonment. See **S v MQIKELA** 2005 (2) SACR 379 (ECD) on 399 A – D. In the current matter this was not done.

[4] The powers of a Court on automatic review do not include the power to increase a sentence or to make orders more

onerous for the accused, where the sentence was an competent sentence. See **S v NOVEMBER AND THREE**

SIMILAR CASES 2006 (1) SACR 213 (C) at 219 E – I.

Where, however, a magistrate's court has imposed an unlawful or incompetent sentence, the Court may on automatic review impose the correct sentence, even where this would result in the sentence being increased. See **S v**

MSINDO 1980 (4) SA 263 (BH) at 265 F – G.

- [5] In the current matter the setting aside of the incompetent sentence and the subsequent imposition of a competent sentence will result in a more onerous sentence. In my view the principles of justice will be violated if this were to be done in the absence of the accused without given her the opportunity to be heard. See **S v MOKOENA** 1984 (1) SA 267 (O) at 269 E – 270 A. The most appropriate manner to afford the accused the opportunity to be heard in an instance like this, would be to refer the matter back to the magistrate's court. In this regard the following is stated in Commentary on the Criminal Procedure Act, Du Toit *et*

al, at p. 30–16:

“Although the High Courts have on several occasions increased sentences on review, it is submitted that cases in which an increase of sentence would be appropriate, be referred back to the magistrate’s court. In so doing the court could avoid the increase of the sentence imposed by the magistrate without the accused having had any say in the matter (Kriegler & Kruger 808).”

[6] In this matter the accused was sentenced on 4 December 2007. Considering that the whole of the sentence was suspended, it must be accepted that the accused was also released on 4 December 2007. The special review only reached the registrar’s office on 7 May 2008. It is evident from the record that the accused is a Lesotho citizen who resides in Lesotho, but that her address had not been confirmed. The J15 indicates the address only as “Maputsoe, Lesotho”. On probabilities the accused would already have returned to Lesotho, especially considering that her husband and two children also reside in Lesotho.

[7] In terms of section 304 of Act 51 of 1977 a Judge is required to certify that the proceedings are in accordance with justice. This does not require the Judge to certify that the proceedings are in accordance with strict law. See **S v ZULU** 1967 (4) SA 499 (T) at 502 D – F. In assessing whether the proceedings are in accordance with justice, it is the duty of the Court to see that justice is done both to the

accused and the state. See **S v ZULU**, *supra* at 501 G. In this regard it is also in the interests of justice that litigation should come to finality. See **S v ZULU**, *supra* at 502 F. Accordingly, when it was required by the interests of justice, the Courts have refused to interfere even with an incompetent sentence. See **S v ZULU**, *supra*, **S v BOSHOF** 1991 (1) SASV 221 (T) and **S v NDLOVU** 1998 (1) SACR 599 (W) at 602 A – C.

[8] In the circumstances of this case, it is clear that considerable time, effort, inconvenience and expense to both the state and the accused would be involved in bringing the accused before court again. In this regard I am mindful of the fact that the accused is a Lesotho citizen and therefore the required (and probably cumbersome) procedures will have to be followed in the state's endeavours to bring her back to South-Africa. Moreover, considering that the address of the accused had not been confirmed, the state might even go to such effort and especially incur the accompanying expense without being successful in tracing the accused. This will result in the matter not being brought to finality. All of the aforesaid will bring about results which neither the accused nor the state desire and will not serve the interests of either party. I am therefore satisfied that the interests of justice demand that the proceedings be confirmed.

[9] The conviction and sentence are confirmed.

C. VAN ZYL, J

I concur.

C. H. G. VAN DER MERWE, J

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