

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

Review No. : 242/2008

In the review case between:-

THE STATE

and

MATHATO ALICE MOTSAMAI

CORAM: VAN ZYL, J *et* MOCUMIE, J

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 21 AUGUST 2008

- [1] The accused was correctly convicted in the Magistrate's Court, Ladybrand, on a charge of dealing in 13,4kg dagga (contravention of section 5(b) of the Drugs and Drug Trafficking Act, Act No. 140 of 1992). She was sentenced to R6 000,00 or 12 months imprisonment as well as an additional 12 months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of contravention of section 5(b) of Act No. 140 of 1992 committed during the period of suspension.

[2] The matter was then referred to this Court in the cause of an automatic review and I raised the following query with regard to the imposed sentence:

- “1. Is the sentence not too harsh?
2. Are the fine and the term of imprisonment not disproportionate to each other?”

[3] With regard to my first query, the presiding Magistrate responded as follows:

“I respectfully submit that the sentence is not too harsh, based on the fact that this kind of offence is prevalent in the district of Ladybrand, the court is dealing this kind of offence on daily basis, both our Sout African citizen and Lesotho citizen, they take advantage of transporting dagga from Lesotho to South Africa.” (sic)

With regard to my second query, the Magistrate responded as follows:

“It is my humble submission that, fine and term of imprisonment are proportionate to each other. According to my calculation one month is R500-00. $R6000-00 \div 500-00 = 12$ months.

With respect if the Honourable Judge is of the opinion that the fine is too harsh, I will recommend to be reduced or set aside.”

(sic)

[4] With regard to the personal circumstances of the accused, it is evident from the record that she is 30 years of age and is estranged from her husband. She has two children whom she has to maintain. In addition hereto, she is also maintaining her brother's three siblings. She is unemployed. The accused explained that she intended selling the dagga in order to earn money to maintain the aforesaid children. She specifically indicated that she does not have any money to pay a fine.

[5] The fact that the accused is a first offender and that she pleaded guilty, are important extenuating factors.

[6] It was correctly pointed by the presiding Magistrate that offences regarding dagga occur frequently in the area of

jurisdiction of the Court *a quo*. That is definitely an aggravating factor that should be kept in mind. However, in my view the presiding Magistrate over-emphasised the seriousness of the offence to the extent that it appears as though the accused is to be punished for the crimes of all other persons smoking and dealing in dagga. In this regard the Magistrate remarked as follows on p.7 of the record:

“I do not know whether you get a lot of money when you cross the border and sell the dagga because it also cost our taxpayers, you sell this dagga, you get the money and (indistinct) feed your siblings and your children but when those people are smoking this dagga, they end up in mental institution we are these taxpayers, us who have to pay to rehabilitate those people. Besides that the people who are smoking dagga they end up in rehabilitation, some of them they are committing serious offences, high jacking of our cars, raping our children or chasing the pregnant women with axes after they smoke this dagga.” (sic)

- [7] In addition to the presiding Magistrate’s over-emphasis of the seriousness of the offence and its alleged consequences, I am furthermore of the view that the current

sentence does not reflect a balance between the fine imposed and the alternative imprisonment – the fine imposed is disproportionately high in comparison with the term of alternative imprisonment. It is trite that the balance between the fine imposed and alternative imprisonment should be reasonable in view of all the circumstances of the particular case. This balance cannot and should never be determined on the basis of a mathematical calculation. In this regard the following was stated in **S v KAPENG** 1992 (1) SASV 596 (O) at 599 F – 600 B:

“Daar is al by herhaling beslis dat die verhouding tussen die boete en die gevangenisstraf wat in die alternatief daartoe opgelê moet word redelik moet wees en afhanklik is van al die omstandighede van die betrokke beskuldigde en die misdaad wat gepleeg is. Reeds solank terug soos 1924 het Regter Feetham in *R v Frans* 1924 TPD 419 op 419 soos volg verklaar:

'Where a fine is imposed as an alternative to imprisonment it should, I think, bear some relation to the probable resources and earnings of the person on whom it is imposed and to the number of months' imprisonment which are considered sufficient as an alternative punishment.'

Dit is by herhaling beklemtoon dat straf soveel moontlik geïndividualiseer moet word (vgl *S v V* 1972 (3) SA 611 (A)).

.....Dit is egter duidelik dat die verhouding tussen 'n boete en 'n periode van gevangenisstraf nooit op 'n wiskundige wyse bereken of toegepas behoort te word nie.”

[8] In the circumstances of this particular case I am of the view that there is an imbalance between the fine imposed and the alternative imprisonment, which in itself would have had the result that the imposed sentence cannot stand.

[9] However, in addition to the aforesaid, I am in any event of the view that the term of imprisonment in this instance is also too long considering all the facts and circumstances of this particular matter. In this regard one should be mindful of the fact that when the appropriateness of a sentence is considered, the suspended term of imprisonment that was additionally imposed, should also be taken into consideration. In **S v MAKOE** 1997 (2) SASV 705 (OPA) at 709 G – 710 A this principle was confirmed in the following words:

“By die beoordeling van 'n gepaste vonnis moet die opgeskorte gevangenisstraf wat addisioneel opgelê is, ook in aanmerking geneem word. Die benadering wat toegepas behoort te word, word uiteengesit in *S v Setnoboko* 1981 (3) SA 553 (O) op 556E - G, waarna daar al by herhaling in hersieningsuitsprake van hierdie Hof verwys is:

"n Suiwerder benadering is egter om nie 'n opsplitsing van die vonnis te doen nie maar om te beoordeel of die oplegging van vyf jaar gevangenisstraf waaraan die reeds genoemde opskortingsvoorwaarde gekoppel is, 'n houdbare uitoefening van die landdros se diskresie was. Dit sou verkeerd wees om na slegs 'n deel van die vonnis te kyk asof die opgeskorte gedeelte nie ondergaan hoef te word nie. Van die opgeskorte gedeelte kan net gesê word dat dit nie noodwendig ondergaan hoef te word nie. Dit bly egter deel van die vonnis van die hof en wel 'n deel wat moontlik ondergaan sal moet word. Die noodsaak van noukeurige afweging van 'n vonnis wat as geheel geskik is, kan nie verslap word slegs omdat daar 'n moontlikheid bestaan dat die opgeskorte gedeelte van die vonnis uiteindelik nie werklike inslag sal hê in die sin dat dit ondergaan moet word nie. Dit bly belangrik om deurgaans onder andere in gedagte te hou dat die volle opgelegde vonnis desnoods uitgedien moet word en gevolglik om die periode van opgeskorte straf in samehang met die onopgeskorte straf in noukeurige oorweging te neem.'

Indien bogemelde benadering toegepas word en daar gelet word op veral die feit dat die beskuldigde 'n eerste oortreder is en meer as twee maande in hegtenis was toe hy gevonnissen is, is die alternatiewe gevangenisstraf sowel as die opgeskorte gevangenisstraf sodanig onvanpas dat daarmee ingemeng moet word.”

Also see **S v SEOELA** 1996 (2) SASV 616 (O).

[10] Considering all the factors I mentioned, I consider the sentence imposed to be inappropriate to such an extent that it should be interfered with. The sentence mentioned below would be appropriate in view of all the circumstances of this case as appears from the record and the Magistrate’s written reasons.

[11] It is necessary to mention that it is evident from the record that there were a number of delays in this matter, both on the side of the Court *a quo* and this Court. It appears that these delays were due to administrative problems on the side of the both Courts. Considering when the accused was sentenced and considering the reduction of the sentence which I intend imposing, I consider it in the

interest of justice that a copy of this judgment should forthwith be send to the Clerk of the Court *a quo* via facsimile with the instruction to immediately bring this judgment under the attention of Correctional Services at the prison where the accused is being detained.

[12] Accordingly the following order is made:

12.1 The conviction is confirmed.

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

“A fine of R3 200,00 (three thousand two hundred rand) or 9 months imprisonment plus a further 12 months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of contravening section 5(b) of Act 140 of 1992 committed during the period of suspension.”

12.3 The sentence must be deemed to have been imposed on 8 January 2008.

12.4 The Registrar is requested and directed to forthwith send a copy of this judgment via facsimile to the Clerk

of the Court, Ladybrand, and the said Clerk of the Court is requested and directed to immediately bring this judgment to the attention of Correctional Services at the prison where the accused is being detained.

C. VAN ZYL, J

I concur.

B. C. MOCUMIE, J

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