

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

Review No. : 282/2008

In the review between:-

THE STATE

versus

M PULE

CORAM: MOCUMIE, J et MOLEMELA, J

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 04 SEPTEMBER 2008

[1] The matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977 ("the CPA").

[2] The accused person was charged with contravention of section 5 (b) read with section 13 (i) , 17 (e), 18m ,19 and 25 of the Drug and Drug Trafficking Act 140 of 1992 ("the Drug Trafficking Act") i.e dealing in an undesirable dependence producing substance to wit 5,4 kilograms of dagga. She pleaded guilty and, pursuant to questioning by the court in

terms of section 112 (1) (b) of the CPA she was then found guilty as charged. She was sentenced to a fine of R 4000-00 (four thousand Rand) or 24 (twenty four) months imprisonment of which R1000-00 (one thousand Rand) or 6 (six) months imprisonment was suspended for a period of 3 (three) years on condition that the accused is not convicted of contravening section 5 (b) Drug and Drug Trafficking Act.

- [3] The record of the proceedings at the magistrate's court showed that after the accused person had pleaded guilty the magistrate questioned her as follows:

"COURT: *Now is it correct that upon or about the 12th day of March 2008 you were at Ficksburg border of entry?*

ACCUSED: *Yes*

COURT: *This border of entry, is it the magisterial district of Ficksburg?*

ACCUSED: *Yes your Worship.*

COURT: *Did you deal with this undesirable substance being dagga?*

ACCUSED: *Yes, your Worship.*

COURT: *This substance, do you admit that it was dagga you dealt in?*

ACCUSED: *Yes, your Worship*

COURT: *Do you know that it is unlawful to deal in dagga.*

ACCUSED: *Yes I know.*

COURT: *The weight of the said dagga, do you admit it weighed 5.4 kilograms in mass.*

ACCUSED: *Yes your Worship.*

COURT: *And I see the charge sheet says you are registered to national (sic). You came with dagga from Lesotho.*

ACCUSED: *Yes your Worship.*

COURT: *You then crossed the border with that dagga coming to deal with it here in South Africa.*

ACCUSED: *Yes, your Worship.*

COURT: *Why did you deal with such a substance?*

ACCUSED: *Your Worship, I am I widow my husband has passed away since last year and then I am survived by children and they are still minor children. The other one is doing standard 9 and there (sic) are schooling. I struggle to pay their school fees.*

COURT: *Well, you would recall that at the beginning of the questioning of section 112 (1) (B)(sic) of Criminal Procedure Act 51 of 1977, I said I just wanted to establish if you correctly pleaded guilty or if you admit all the allegations leveled against you . From the questions as well as the answers that you provided this Court is satisfied that on this you were at this Ficksburg port and, that you dealt in this substance which is dagga weighing an amount of 5.4 kg in mass. And this Court also finds that you knew that it was unlawful and you also had the intention of dealing with the said dagga. And under the circumstances this court finds the accused guilty of dealing in 5.4 kg of dagga...”*

- [4] Having perused the record I was of the view that the conviction was fatally flawed considering the manner in which the questioning in terms of section 112 (1) (b) of the CPA was conducted by the magistrate. My view was that the presiding magistrate made a legal conclusion that the

accused person was dealing in dagga without establishing any factual basis for that conclusion. I was also of the opinion that even if my views on the conviction were not correct, the sentence imposed did not reflect that the presiding officer had taken proper cognisance of the accused person's personal circumstances. I accordingly requested the magistrate to furnish this court with his reasons for the conviction and sentence and he obliged.

[5] The reasons furnished by the magistrate, were, in my view, not persuasive and I accordingly requested the Director of Public Prosecutions to give an input on both the conviction and the sentence.

[6] Adv S Giorgi's submissions with regards to both the conviction and sentence were as follows:

“Daar moet by die ondervraging meer gedoen word as om slegs te vra of die beskuldigde die bewerings in die aanklag erken. Deur die pleit van skuldig is dit in elk geval reeds gedoen. Dit mag daarom ook onveldoende wees om die beskuldigde stapsgewys iedere bewering in die klagstaat te laat erken. Die hof behoort nie leidende vrae te stel in die ondervraging nie, veral ten opsigte van skuld en

verweersgronde (*S v Gwenya* 1995 (2) SASV 522 (OK))”(own underlining) Hiemstra: *Suid – Afrikaanse Strafproses* , Sesde Uitgawe op p 307. That is exactly what the magistrate did in this questioning, to wit asking leading questions to which the accused just had to say “yes” or “no”. As it was in *S v Phundula*; *S v Mazibuko*; *S v Niewoudt* 1978 (4) SA 855 (T) at 861 d-f: “ Dit blyk uit ervaring dat n onontwikkelde ongesofistikeerde beskuldigde wat besluit het om skuldig te pleit, geneig is om bevestigend te antwoord op enige direkte en leidende vraag met betrekking tot die bestandele van die misdryf wat hy sou gepleeg het... In die algemeen gesproke sou die aangewese manier wees om te vra wat gebeur het en hoe misdaad gepleeg is. Die landdros kan dan toesien dat hy by die punt hou, en vrae verseker dat hy ook aandag skenk aan die bewerings in die aanklag”.

It is clear from the record that it did not appear from the charge sheet what facts the state alleged had rendered the accused guilty of the offence charged. The prosecutor also did not address the court to enlighten the magistrate of these facts. As Horwitz A J put in S v De Klerk 1992 (1) SACR 181 (w) at 183 a-b: “Neither of these issues is one of the facts in the sense that that word is used in s 112 (1) (b) of the Criminal Procedure Act: they are conclusions drawn from the facts. It is vitally important that the distinction (between facts and conclusions drawn there from) be born in mind when s 112(1)(b) of the Criminal Procedure Act invoked ,not only in the instant type reasonableness, negligence and recklessness, constitute an essential ingredient of the offence charged.”

I agree with the Honourable Reviewing Judge’s remarks that the magistrate made a legal conclusion that the accused was dealing with dagga without establishing a basis for that. (See S v Adams en Tien Ander Soortgelyke Sake 1986 (3) SA (k)) I

therefore recommend that the conviction be set aside and that the matter remitted to the magistrate to properly apply the provisions of section 112 (1) (b) of Act 51 of 1977 anew. The same goes for the sentence. I am of the opinion that the sentence is too harsh when one looks at S v Sithole 2005 (2) SACR 504 SCA and the cases referred to therein.”

- [7] I am grateful to Adv S Giorgi's detailed submissions and am in full agreement therewith. I am of view that the questioning that was embarked upon by the magistrate, purportedly as contemplated in section 112 (1) (b) of the CPA, is not satisfactory at all. The accused person was unrepresented. The magistrate did not in any way try to probe in order to establish what the accused person's understanding of the concept "dealing in dagga" was. No attempt whatsoever was made to elicit any factual information from the accused person. Instead, she was merely asked to confirm her plea by making a series of admissions in respect of each element of the offence considered. This method of questioning clearly flies in the face of all authorities as cited above. See also **S v Ntlakoe 1995 (1) SACR 629 (O) at 633 b-d; S v Lebakeng 1978 (2) SA 674 (O) at 676 A and S v Mokoena 1982 (3) SA 967 (T) at 968.** That being the case, the

proceedings were not in accordance with justice and the conviction cannot be allowed to stand.

[8] With regards to the sentence, a fine was imposed on an unemployed widow who was the primary caregiver of three children without even establishing her ability to pay a fine. The case of **S v Sithole 2005 (2) SACR 504 (SCA)** and **S v M 2008 (3) SA 232 (CC)** at paragraph 36 fortify my view that the sentence imposed is not appropriate under the circumstances and also falls to be set aside.

[9] I accordingly make the following order:

1. The conviction and sentence are set aside.
2. The matter is to be heard *de novo* before another magistrate.

M B MOLEMELA, J

I concur.

B C MOCUMIE, J

/am