

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

Review No. : 390/2007

In the review between:-

THE STATE

versus

PHILLIP AYANDA TLHORISHO

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

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 28 JUNE 2007

[1] The accused pleaded guilty to possession of dagga in contravention of section 4(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992 and he was properly convicted in accordance with his plea of guilty. The accused was then sentenced to a fine of R1 200,00 or 4 (four) months imprisonment as well as an additional 3 (three) months imprisonment wholly suspended for a period of 5 (five) years on condition that the accused is not convicted of

contravention of section 4(b) of Act No. 140 of 1992 committed during the period of suspension.

- [2] In the charge sheet it was alleged that the accused was in possession of 60 grams of dagga. During questioning in terms of section 112(1)(b) of the Criminal Procedure Act, No. 51 of 1977, the accused was not asked to admit the alleged mass of the dagga. The accused however said that he was in possession of two “cushions” of dagga which he bought for R5,00 apiece for purposes of smoking them himself. The accused should therefore have been sentenced on the basis that he was in possession of dagga of which the so-called street value was only R10,00.
- [3] The accused was undefended. He elected not to testify under oath before sentence. However during specific questioning by the magistrate in this regard, the accused said that he will not stop smoking dagga. This was regarded by the magistrate as a strong aggravating factor. The magistrate also held it against the accused that he was

smoking dagga with so-called street kids and that he therefore did not have their best interests at heart. Moreover, the magistrate sentenced the accused on the basis that street kids get dagga "... from people like you".

- [4] I strongly doubt whether it is a fair procedure for a magistrate to question an accused in these circumstances on whether he intends to stop smoking dagga or not. In any event, to regard an answer by the accused that he will not stop smoking dagga as an aggravating factor, in my view amounts to punishing the accused for his honesty whilst ignoring the addictive effect of smoking dagga. Common experience shows that the majority of accused persons who in these circumstances promise to stop smoking dagga, are either downright dishonest or will fail to keep a promise honestly made. There was no evidentiary material before the magistrate to the effect that the accused smoked dagga with or even in the presence of the street kids. The accused only said that when he was arrested for being in possession of dagga, he was in the presence of the street kids who were

themselves in possession of their own dagga. Similarly, there is no basis whatsoever for a finding that the accused belongs to a group of persons that supply street kids with dagga. As a result of these misdirections, the sentence cannot stand.

[5] The accused is 28 years of age, single and a first offender. He is unemployed but did odd jobs for R150,00 – R250,00 per day. As stated above, he was in possession of a small amount of dagga for own use. In my view a sentence of R600,00 or 2 (two) months imprisonment is appropriate in the circumstances of this case.

[6] In the result the sentence is set aside and replaced with a fine of R600,00 or 2 (two) months imprisonment.

C.H.G. VAN DER MERWE, J

I agree.

C. VAN ZYL, J

/sp