

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

Review No. : 598/2007

In the review between:-

THE STATE

and

JOSEPH MASEKO

CORAM: VAN ZYL J

JUDGEMENT BY: VAN ZYL J et MOLEMELA AJ

DELIVERED ON: 13 SEPTEMBER 2007

[1] The accused was charged with the offence of contravening section 4(b) of the Drugs and Drug Trafficking Act, 140 of 1992, being the use or possession of 2,6 kilogram dagga. He pleaded guilty to the said charge and was rightly convicted. The accused was then sentenced as follows:

“Fined R2 000.00 (two thousand rand) or 9 (nine) months imprisonment of which 5 (five) months imprisonment or R1 000.00 (one thousand rand) is suspended for a period of 5 (five) years on

condition that accused is not convicted of contravening section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 committed during the period of suspension. Plus 30 (thirty) days imprisonment wholly suspended for a period of 5 (five) years same conditions (applicable) as above.” (*sic*)

[2] It was furthermore ordered in terms of section 103(2) of the Firearms Control Act, No. 60 of 2000, that the accused was declared unfit to possess a firearm.

[3] The matter was then sent on special review with the request that the sentence be amended by setting aside the part of the sentence that reads “plus 30 (thirty) days imprisonment wholly suspended for a period of 5 (five) years ...”. The magistrate based this request on the following:

“It is my respectful and humble submission that I bona fide erred as imposing the above mentioned sentence.... I noticed the mistake when I was proof reading the record” (*sic*)

[4] The special review served before Wright J and he then posed the following queries to the magistrate:

“1. Reasons for sentence are required as the alternative imprisonment (9 months, although partially suspended) seems heavy in relation to the fine.

2. Reasons are requested with regard to the decision to declare the accused unfit to possess a firearm.

3. On receipt of the above reasons the Court will deal with the Special Review.”

[5] In response to the aforesaid queries, the magistrate reacted as follows:

“It is the humble submission of this court that upon a proper perusal of the court record the court humbly concedes (in retrospect) that the sentence imposed by this court is indeed harsh in the circumstances.

In light of the decision in **S v Kolobe 2006 (1) SACR 118** I humbly request the Honourable Reviewing Judge to set aside the order declaring accused unfit to possess a firearm.

I respectfully request that the Honourable Reviewing Judge to alter the sentence accordingly.” (*sic*)

[6] I agree with the magistrate that the 30 (thirty) days suspended imprisonment imposed in addition to the sentence of R2 000,00 (two thousand rand) or 9 (nine) months imprisonment should be set aside. Although such an additional term of imprisonment is a competent sentence in terms of the Drugs and Drug Trafficking Act for purposes of the offence of possession of dagga, it is normally reserved for circumstances where the applicable offence is one of dealing in dagga. The imposition thereof in a matter of

possession of dagga, in my view, definitely makes the sentence shockingly harsh and not in accordance with justice.

[7] With regard to the rest of the imposed sentence, I agree with the view expressed by Wright J that the term of imprisonment seems unduly harsh in relation to the fine. However, in my view, and even should this imbalance be rectified, the whole of the said sentence still remains too harsh. In the particular circumstances of this case, considering the weight of the dagga, the answers given during the questioning in terms of section 112(1)(b) and the personal circumstances of the accused, I consider a sentence of R900,00 (nine hundred rand) or 3 (three) months imprisonment an appropriate sentence.

[8] As far as the order declaring the accused unfit to possess a firearm is concerned, the magistrate in her response to the queries raised by Wright J, rightly referred to the judgment of **S v KOLOBE** 2006 (1) SACR 118 (O), which is on all fours with the current matter. In that judgment Musi J, with whom Wright J concurred, stated as follows:

“With respect, there was no basis for assuming that this particular accused has a propensity for violence or that he was likely to misuse a firearm in the future. As a matter of fact, the offence for which he has been convicted has nothing to do with a firearm or use of violence of whatever nature.

The question I posed was specifically whether it was competent to make the order in question in the circumstances of this case. Section 103(1) of the Firearms Control Act lists the offences in respect of which a person may be declared unfit to possess a firearm. Subsections (h) and (j) are the only ones that may possibly apply to the instant case. Subsection (h) provides for declaration of unfitness in respect of any offence for which an accused has been sentenced to a period of imprisonment without the option of a fine. This provision is certainly not applicable to the instant case. Subsection (j) relates to any offence involving the abuse of alcohol or drugs. Now the accused has confessed that he kept the dagga found in his possession for purpose of smoking it. There is no indication, however, that he abuses it. It is significant that the subsection says 'abuse of alcohol or drugs'. Just as one may drink alcohol without abusing it, so is it that one may smoke dagga without abusing it. It is significant also that possession of dagga has not been included in the offences listed under s 103(1), whereas dealing in dagga is specifically listed under the subsection immediately following ss (j). In my view, that clearly shows that the Legislature could not have intended that unfitness to possess a firearm should befall a person convicted of mere possession of a drug. Section 103(2) refers to offences listed in Schedule 2 to the Act and stipulates that a court convicting a person of such offences must enquire whether the person is fit to possess a firearm. The only instance that may possibly apply to the instant case is that listed under item 7(a), but then, this refers to an offence provided for in the Firearms Control Act or its predecessor. The accused has not been convicted of a contravention of the provisions of the Firearms Control Act and this provision does not apply to him. I come to the conclusion that it was not competent to invoke the provisions of s 103 of Act 60 of 2000. There was no basis for invoking such provision in the instant case."

[9] Consequently the order declaring the accused unfit to possess a firearm, was not a competent order and should be set aside.

[10] The following order is therefore made:

1. The conviction of the accused is confirmed.
2. The sentence is set aside and substituted with the following:

A fine of R900,00 (nine hundred rand) or 3 (three) months imprisonment.

3. The order declaring the accused to be unfit to possess a firearm, is set aside.

C. VAN ZYL, J

I concur.

M.B MOLEMELA, AJ

/sp