

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

Review No.: 758/2007

In the matter between:

THE STATE

and

TSHEPO MOALODI

CORAM: VAN ZYL, J *et* MABESELE, AJ

JUDGEMENT: VAN ZYL, J

DELIVERED ON: 29 NOVEMBER 2007

[1] The accused was charged in the Magistrate's Court of Ficksburg with the offence of contravention of section 4(b) of the Drugs and Drug Trafficking Act, 140 of 1992, being the use or possession of 5.4 kilogram dagga. He pleaded guilty to the said charge and was rightly convicted. The accused was then sentenced to 6 months imprisonment.

[2] The matter then served before me on automatic review in the ordinary cause and I posed the following query to the magistrate:

“Should the option of a fine not have been included in the sentence? Reasons for sentence are requested.”

[3] In response to the aforesaid query, the magistrate reacted as follows:

°The accused indicated before court that he will not be in a position to pay a fine (record page 6). The court held a view that it will be inappropriate to include an option of a fine in the circumstances. In **S v NTLELE** 1993 (2) SACR 610 (W), it was held that before a court would be justified in imposing a fine clearly beyond the ability of the accused to pay, a proper enquiry by the court should be held. In the present case such enquiry was held to establish if the accused was in a position to pay or not. **(Record page 6 lines 15-19)**. I concede that when I made this enquiry I did not want to send the accused directly to jail in the light of his personal circumstances especially the fact that he is a first offender, pleaded guilty and had nothing to hide to the court.

I therefore concede that this case needs interference based on the aforesaid. However, it is respectfully submitted that, based on the enquiry that was made, it would still be inappropriate to include a fine since it is clear that the accused cannot afford to pay same.

I have, however, taken cognizance of the case of **S v Makoae** 1997 (2) SACR p. 706 (O), where it was held that the income of the accused is not a decisive factor to establish his ability to pay a fine. In Makoae's case it was also held that an option of a fine has to be provided in cases of this nature. I am however of the view that its imprisonment wholly suspended

on condition that the accused is not again convicted of contravention of sections 5(b) or 4(b) Act 140 of 1992 committed during the period of suspension, is a suitable sentence in the present matter. This recommendation is based on the following aggravating factors: this offence is very prevalent in the area of Ficksburg and it should be prevented from further happening, this was relatively a high quantity of dagga (5,4 kg), this dagga was conveyed to Marquard for purposes of sale.

I am of the view that this sentence will serve as deterrence towards prospective offenders whereas on the other hand it will promote respect for the law.” (*sic*)

[4] I agree with the magistrate’s concession that the accused should not have been sent directly to jail and the imposed sentence therefore justifies interference. However, I do not agree that a fully suspended sentence is appropriate, as it will be too lenient in the circumstances of this case.

[5] The magistrate, in my view, correctly referred to the principles set out in the matter of **S v MAKOE** 1997 (2) SACR 706 (O). In this regard I wish to specifically refer to the conclusion drawn by Wright J on 709 b – c:

°Hierdie is duidelik 'n geval waar die beskuldigde nie in staat sal wees om uit sy eie inkomste 'n boete wat gepas sal wees in die lig van die erns van die misdryf te betaal nie. Nogtans word daar saamgestem met die beginsel, dat in misdade van hierdie aard, die keuse van 'n boete aan 'n eerste oortreder verskaf moet word. (Cf bv S v Nxumalo 1992 (2) SACR 268 (O) en S v Monisa 1992 (2) SACR 671 (O) op 672i.)”

[6] In this instance the accused is a 25 year old first offender. He is married with two children. His wife is unemployed and at the time of his arrest the accused was a hawker selling fruit and he from time to time assists on farms during plough time. He does not have a steady income, but he sometimes earn up to R50,00 per week. I also take into consideration in the accused's favour the fact that he pleaded guilty to the said charge and that he was only charged with and convicted of possession of dagga and not dealing therein.

[7] The aforesaid mitigating factors and personal circumstances of the accused should be properly balanced against the aggravating factors pertaining to the nature of the offence and the interest of the community. As correctly pointed out by the magistrate, this offence is very prevalent within the area of jurisdiction of the court *a quo* and it is the court's duty to protect the community against the continuous reoccurrence of these offences. The imposed sentence should therefore suit both the accused and also

serve as deterrence for prospective offenders.

[8] After a careful consideration of all the aforesaid facts and circumstances of this case and in view of the principles stated in **S v MAKOE**, *supra*, with which I respectfully agree, I consider it appropriate that the accused be granted the option of a fine.

[9] Accordingly the following order is made:

9.1 The conviction is confirmed.

9.2 The imposed sentence is set aside and substituted with the following:

“A fine of R800,00 or in the event of non-payment thereof, 4 months imprisonment.”

9.3 The aforesaid sentence should be considered to have been imposed on 15 August 2007.

C. VAN ZYL, J

I concur.

M. M. MABESELE, AJ

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