

Reportable: Yes / No
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Yes / No

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IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case No: CA&R 67/06
Heard: 05/06/2006
Delivered: 19/06/2006

PAMELA ALONA PAIN

APPELLANT

versus

STATE

RESPONDENT

Coram: KGOMO JP *et* MOKGOHLOA AJ

JUDGMENT ON APPEAL

MOKGOHLOA AJ:

1. The appellant appeared in the Magistrate Court Kimberley on the 23rd August 2005 on a charge of contravention of section 5(b) of Act 140 of 1992 i.e dealing in dangerous dependence producing substance namely, cocaine. She pleaded guilty to the main charge

and was convicted and sentenced on the same day to 4 years imprisonment, 2 years of which was suspended for 5 years on certain conditions. The appellant was legally represented. She now appeals against both her conviction and sentence with leave of the High Court.

- 2.** The appellant's statement in terms of Section 112(2) Act 51 1977 reads as follows:

"I PAMELA PAIN am an adult female aged 24 years residing at 4 Bowen Street, Klisserville, Kimberley. I'm the accused in this matter and understand the contents of this statement. I made this statement freely and voluntarily. I plead guilty to the charge put before me. The facts are as follows:

- 1. On the 30th November 2004 I dealt in 0,98 grams of cocaine. During this period in my life I showed weak character traits as a result of the death of my fiancé. It was up to me to preserve the lives of our two children. This was a very trying period in my life. I was very naive and started dabbling in unsavory deals to be able to secure as an income for my children and I. The Social Workers were at that time investigating me and there was a possibility that my kids were to be taken away from me. As a result of my work's circumstances I started using drugs to keep me away from reality.*

2. *The Nigerians were the easiest way out as they supplied me frequently with my drug supplies. On the 30th November 2004 Jaco approached me to get 0.98 grams of cocaine for him. I now know that Jaco was an intelligence agent in this operation. In this messed up circle I was merely a runner and not dealing myself. At this stage the most important thing for is to keep my children and put food in their mouths. That night Jackson the Nigerian sold the cocaine to me and I then handed in over to Jaco. At no stage had I gained any profit from these transactions. At this stage my life is all cleaned up, I sought help for my drug abuse and supply the National Intelligence Agency with important information regarding drug trafficking."*

The state accepted the factual basis of the appellant's plea and she was convicted as charged.

3. Section 5(b) of Drugs and Drug Trafficking Act 140 of 1992 states:

"No person shall deal in-

- (a) any dependence producing substance; or*
- (b) any dangerous dependence- producing substance or any undesirable dependence producing substance,*
i.unless-
- (c) he has acquired or bought any such substance for medical purposes..."*

The term '*deal in*' is further defined in Chapter 1 of the said Act as:

"in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug's"

4. In **S v Solomon 1986 (3) S A 705 (A)** Smalberger JA dealt with the question whether an intermediary or agent who procures a prohibited substance for the buyer for the latter's own use constitutes dealing in those substances as defined in the previous act. He found that such person is only committing an act of acquisition of the substance, not the supply thereof. He held that it was not the intention of the Legislature that a person who buys prohibited or dangerous dependence producing medicine for his own use thereby performs an act in respect of the "*sale*" or "*supply*" of such substances within the extended meaning of the definition of dealing in Section 1 of Act 41 of 1971.

5. In **S v Jacksons v Phillips 1990 (2) SACR 505 (E)** Jones J

stated that:

“On a proper understanding of Solomon’s case an intermediary who acquired and possesses dagga with the object of passing some or all of it on to another is not necessarily performing an act in connection with the sale or supply of dagga. He does not necessarily change his character from buyer to supplier or dealer once he hands the dagga over or intends to hand it over to another. Each case will depend upon its own facts. Solomon’s case and William’s case demonstrate that the role of the intermediary must be probed with care to see whether he really is a supplier as defined in the Act and as explained in Solomon’s case, or whether he had merely acquired the dagga for another and was merely holding it for the purpose of giving it to its owner, in which event he is a mere conduit who cannot be convicted of more than possession.”

6. CONVICTION

In the present case it is clear that the appellant’s plea amounted to the admission of possession of this drug and not dealing therein. Both counsel for the appellant and the respondent share the same view. It is also unlikely that the State would succeed in proving dealing as the prosecutor has accepted the factual basis of the appellant’s plea. For this reason the conviction on dealing cannot stand and must be replaced with one of guilty on possession.

7. SENTENCE

The setting aside of the conviction requires that the sentence be interfered with for obvious reasons. Both counsel for the State and the appellant agree that a sentence of 4 years imprisonment half thereof suspended is too harsh for a conviction of possession. The appellant is 26 years old. She has two minor children who were aged 4 years and 2 years at the time of the trial. She is a single parent. She is a first offender and pleaded guilty and therefore showed remorse. She is also prepared to give information to the police regarding drug trafficking. She is working and earns R2 000.00 per month. She is currently on bail of R3 000.00. Taking all these factors into consideration, I am of the view that the sentence has to be reduced to fit the offence, the personal circumstances of the appellant and take sufficient account of the interest of the society.

8. Mr Nel for the appellant has stated that the appellant would be in a position to pay a fine of R3 000.00. This amount would not reflect the seriousness of the crime correctly. The amount has to be doubled. In addition a further term of imprisonment which is suspended will act as a deterrent. Mr Nel has also pointed out that

appellant's boyfriend will assist her to pay a fine, and asked for the fine to be deferred. R3 000.00 must be paid within 10 days of this judgment and the balance of R3 000.00 not later than the 31st July 2006.

The following order is made:

1. The conviction in dealing in a dangerous dependence producing substance in terms of section 5(b) of Act 140 of 1992 is set aside and replaced with: "Guilty of possession of a dangerous dependence producing substance in terms of section 4(b) of Act 140 of 1992".

2. The existing sentence of 4 (four) years imprisonment, half of which is suspended, is set aside and replaced with: "The accused is sentenced to pay a fine of R6 000.00 (six thousand rand) or in default of payment to serve one year imprisonment. She is further sentenced to an additional one year

imprisonment, which is suspended for five years on condition that the accused is not convicted of dealing or possession of dangerous dependence producing substances (contraventions of sections 4(b) and 5(b) of Act 140 of 1992), committed during the period of suspension”.

3. The R6 000.00 is deferred as follows:

3.1 R3 000.00 is to be paid within 10 (ten) days of this order.

3.2 The balance of R3 000.00 is to be paid on or before the

31st July 2006.

**FE MOKGOHLOA
ACTING JUDGE**

I concur and it is so ordered:

**FD KGOMO
JUDGE PRESIDENT**

For the Appellant: Adv IJ Nel, instructed by Hugo, Mathewson and
Oosthuizen Inc. Kimberley

For the Respondent: Adv CG Jansen, Office of the Director of Public Prosecutions