

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

Review No. : 877/2005

In the review between:

THE STATE

and

SIBUSISO XOLILE LUDUDE

CORAM: RAMPAL J *et* BLOEM AJ

JUDGMENT BY: RAMPAL J

DELIVERED ON: 25 AUGUST 2005

- [1] The accused was convicted on his plea in the Dewetsdorp district court on 22 June 2005 of the contravention of section 4(b) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), (the Act), namely illegal possession of 855 grams of dagga. On the same day he was sentenced to a fine of R3 000,00 or 6 months' imprisonment plus a further 6 months' imprisonment conditionally suspended for 4 years

on condition that the accused not be convicted of section 4(b) of the Act committed during the period of suspension.

[2] The matter was subsequently allocated to me on review. I then asked the magistrate to furnish reasons for the sentence he imposed on the accused.

[3] In his response to my request the magistrate commented as follows:

“1. It is evident from accused own explanation that he committed offence with full knowledge of the unlawfulness and consequences of his conduct thus deliberately violating the law.

2. The above fact is confirmed by accused previous conviction of similar offence and this entitled the court to treat accused as a second offender taking into consideration accused personal circumstances, seriousness of the offence and the interests of society as amplified on reasons of sentence contained in the record.

3. The court recognised that the criminal justice system exists to serve the interests of public and sentencing being an integral part of system has same reasons.

Therefore the court imposed sentence in order to send a clear message on one hand to the prospective criminals that this type of conduct, especially if repeated in circumstances of the present case, cannot be tolerated, and on the other hand to the public that courts take seriously the restoration and maintenance of law and order.

4. In light of the foregoing it is my humble submission that the sentence imposed is not excessive but is in fact lenient as accused has

once more been afforded an alternative of a fine to keep him out of jail which was paid without any difficulty or delay.”

[4] The following were the personal circumstances of the accused. He was 21 years old at the time of the offence. He was an unmarried man. He was the father of one minor child. He was the sole breadwinner of ten dependants. His dependants consisted of his mother, his father, his seven younger siblings and his own child. His parents were unemployed and they were not receiving any social welfare grants. Some of his siblings were still school-going. He was a casual street vendor. His income fluctuated between R1 200,00 to R1 500,00 per month. He pleaded guilty to the charge. He expressed remorse. He boiled the leaves of the dagga plant and used the resultant liquid substance for medicinal purposes. He had one previous conviction of illegal possession of this prohibited drug.

[5] I consider the following circumstances to constitute mitigating factors in favour of the accused: his relative youth; his plea of guilty; his expression of remorse; his status as the sole

breadwinner; the small quantity of the prohibited substance found in his possession and the motive for his use of the prohibited substance. Regrettably the record does not show the accused's level of formal education.

[6] The main aggravating factor was that the accused was not a first offender. On 5 August 2004, about ten months before the current conviction, the accused was convicted of the same offence. He was sentenced to a fine of R1 000,00 or 3 months' imprisonment. Half of the sentence was conditionally suspended for 3 years.

[7] The accused has now breached the condition of the partially suspended sentence imposed on him last year. The magistrate correctly pointed out during the sentencing phase that the accused did not heed the previous warning. But then the magistrate went further and remarked that the court was now required to ensure that the accused did not repeat his actions. I understood the magistrate to mean that it was now time he imposed a stiffer sentence on the accused than it was done previously. In his reasons for sentence the magistrate replied that he imposed the current sentence in order to deter prospective criminals, especially second

offenders, by showing them that possession of the prohibited substance in question could no longer be tolerated.

[8] In **S v MOSIA** 1997 (2) SA 687 (OPD) the accused, a 39 year old first offender, had been sentenced by a district magistrate to a fine of R3 000,00 or 18 months' imprisonment for the illegal possession of **8 kg of dagga in contravention of section 4(b) of the Act**. On review the court held that the sentence was shockingly severe, set it aside and substituted therefor one of a fine of R800,00 or 4 months' imprisonment.

[9] In the instant case, though the accused was a second offender, I am of the view that the sentence imposed on him was shockingly severe and disturbingly inappropriate regard been had to the comparatively small quantity of 855 grams of dagga. The sentence of this severity in this division befits distributors and not consumers. Compare this with **S v MAKOA**E 1997 (2) SA 705 (OPD) where the accused, a 21 year old first offender, was convicted of **dealing in 6 kg of dagga in contravention of section 5(b) of the Act**. He was sentenced by the magistrate to a fine of R3 000,00 or 30 months' imprisonment plus a further period of 30 months' imprisonment conditionally suspended for 5 years. On review the sentence was drastically reduced by this court to a fine of R3 000,00 or 8 months' imprisonment plus 12 months' imprisonment conditionally suspended for 4 years.

[10] Upon my reading of the record I am convinced that the

magistrate has over-emphasized the accused's previous conviction, his motive for using the substance and the deterrent objective of sentencing to the detriment of the accused. It seems to me that too much emphasis was laid on the gravity of the crime as well as on the interest of the community and that too little emphasis was laid on the profile of the accused as an individual. The ultimate inappropriate sentence was occasioned by such imbalance. The misdirection was so material that it justifies interference with the sentence imposed. Since the proceedings were not, in my opinion, in accordance with justice, the sentence cannot be allowed to stand.

[11] Accordingly I make the following order:

11.1 The conviction is confirmed.

11.2 The sentence is set aside. It is substituted with one of
a fine of R900,00 or 3 months' imprisonment .

11.3 The difference of R2 100,00 between the fine of R3 000,00 and R900,00 must be refunded to the accused as soon as practically possible.

11.4 The dagga which was found in the possession of the accused is declared to be forfeited to the State in terms of section 25(1)(a)(iii) of the Act.

M.H. RAMPAL, J

I agree.

G. BLOEM, AJ

/sp