IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

High Court Ref No: 1379/04
Magistrate's Serial No: 67/04
Review Case No: C330/04

12 November 2004

Magistrate
RANDFONTEIN

THE STATE v MLAMBO, WONDERBOY BEN

REVIEW JUDGMENT

MARAIS, J:

The Senior Magistrate of Randfontein, Mr Goosen, very properly and perceptively sent this matter on special review to this Court.

The accused was properly convicted of dealing in 121 grams of an "*undesirable dependence-producing substance*" as defined in section 1 of the

Drugs and Drug Trafficking Act, No 140 of 1992 ("*the Act*"). The substance was that commonly referred to as dagga.

The accused was sentenced to a fine of R1 000,00 or 5 months imprisonment. The issue is whether, having regard to the penalty prescribed by section 17(e) of the Act, it was only competent to impose a fine with an alternative of imprisonment if such sentence was coupled to a sentence of direct imprisonment (whether suspended or not).

Section 17(e) of the Act read with section 13(f) applies to offences described in section 5(b) of the Act, under which section dealing in dagga falls. Section 17(e) provides that a person convicted under the Act shall be liable:

> "*(e) In the case of an offence referred to in section 13(f), to imprisonment for a period not exceeding 25 years, or to <u>both</u> such imprisonment <u>and</u> such fine as the court may deem fit to impose*." (my own underlining)

I requested the opinion of members of the staff of the Director of Public Prosecutions and I have received a thoroughly researched, well-reasoned and thoughtful opinion from advocates Mitchley and Schutte, for which they are thanked.

I have been referred to a number of High Court judgments dealing with sentences where section 17(e) applied. In *S v Sihiya* (an unreported

decision) Schwartzman J regarded the sentence of a fine of R1 000,00 or 3 months imprisonment to be "*an incorrect sentence*" "*regard being had to section 17(e) of the Act*". Schwartzman J does not expressly say that the deficiency in the sentence was that it was necessary to impose a sentence of direct imprisonment before imposing a fine but it would appear that this is what he had in mind.

In *S v Mahlangu* 2004 (1) SACR 281 (T) Jordaan and Grobbelaar JJ sentenced the accused to a fine alternatively imprisonment. They did not refer to the provisions of section 17(e). They did however refer to a number of cases in which a conviction for dealing in dagga resulted in a fine with an alternative of imprisonment being the only sentence imposed. In particular the court referred to *S v Sokweliti* 2002 (1) SACR 632 (Tk) in which Jafta J concluded that a sentence of both imprisonment without the option of a fine and a fine should be reserved for very serious cases of dealing in drugs.

In *Sokweliti* Jafta J (at 633d-e) refers to section 17(e) which, so he states, provides "*that the penalty for dealing in drugs shall be imprisonment for a period not exceeding 25 years or to both such imprisonment and such fine as the court may deem fit to impose*". Section 17(e) does not provide the penalty generally for dealing in drugs but provides the penalty for dealing in certain specific drugs. Having referred to the provisions of section 17(e) Jafta J

concludes:

> "*It is quite clear that the trial court is given the discretion* (to) *decide what would be the appropriate sentence in a particular case within the defined options of a fine or imprisonment or both such imprisonment and a fine.*"

I am unable to agree with this statement. It is not clear to me that the section intends to vest the court with a discretion to choose which of the sentences or which combination of sentences to impose. On the contrary the wording of the section leaves me in no doubt that the opposite is intended and that the court is obliged to impose a sentence of direct imprisonment and only when it has done so may it couple a sentence of a fine with an alternative of imprisonment to the sentence of direct imprisonment.

The first part of the sentencing provision provides only for direct imprisonment ("*imprisonment for a period not exceeding 25 years*"). The court is then authorised to impose an alternative form of punishment which is "*or <u>to both such imprisonment and such fine</u> as the court may deem fit …*". To interpret this section as authorising the imposition of <u>any</u> of the bouquet of punishments is to ignore the effect of the words "*both*" and "*and*". The legislature is stating clearly that the only alternative to a sentence of direct imprisonment is the imposition of "*both such imprisonment*" <u>and</u> a fine.

My conclusion is underlined by the significantly different penalties provided in sections 17(a), (b), (c) and (d), where the wording differs materially from that of section 17(e). In each previous section the court is authorised to sentence the accused to a "*fine … or to imprisonment …, or to both such fine and such imprisonment*".

In each case therefore the first sentence option is a fine and imprisonment is thereafter authorised as an alternative sentence to the imposition of a fine. This difference makes the intention of the legislature in section 17(e) even clearer, as the preceding sections authorise a fine as the first of three options. Section 17(e) signally does not and only authorises a fine in conjunction with imprisonment ("*or to both such imprisonment and such fine as the court may determine*"). (In each case above where there is underlining it is my own.)

The change in wording was clearly not accidental, but the change appears to have eluded numerous courts including those hearing the matters of *Mahlangu* (and various cases there cited) and *Sokweliti*. What is apparent from the change in wording is that the legislature intended that dealing in dagga should be dealt with much more severely than lesser offences such as possession thereof.

I am therefore satisfied that the conclusion of Jafta J is clearly wrong and his

judgment in *Sokweliti* should not be followed. Similarly *Mahlangu* was clearly wrongly decided, presumably per *incuriam*, and I decline to follow it.

In so far as Jafta J appeared to rely upon what was said by White J in *S v Nkombini* 1990 (2) SACR 465 (Tk) that reliance is misplaced as that case was concerned with Act 41 of 1971 with wholly different penal provisions, as appears from 634c-d of the judgment of Jafta J. That Act specifically authorised the imposition of a fine or imprisonment "*or both such fine and such imprisonment*" (my own underlining).

In the unreported matter of *S v Zwane* (N) delivered on 8 June 2004 it would appear that the court was of the view that the sentence of a fine or imprisonment for dealing in dagga did not comply with the penalty clause although it found that it could not interfere for reasons which are not relevant.

In *S v Mohome* 1993 (1) SACR 504 (T) Smit J, with whom Preiss J concurred, dealt with the sentencing options provided by the previous legislation being Act 41 of 1971. As appears from the judgment of Smit J at 505i the wording of section 2(i) of that Act was almost identical to that of section 17(e) of the present Act. The court referred to authority including *S v Mazibuko* 1992 (2) SACR 320 (W) where Cloete J (at 322j to 323a) interpreted the relevant provision as requiring imprisonment to be imposed and authorising the

imposition of a fine in addition to such imprisonment. The court concluded that "*die artikel bepaal egter duidelik dat sodanige boete bykomend tot gevangenisstraf sonder die keuse van 'n boete moet wees*". When *Mazibuko* was decided the penal provisions of Act 41 of 1971 had been amended by the provisions of Act 78 of 1990.

I am in complete agreement with these cases.

I accordingly hold that where there is a conviction of contravening section 5(b) of the Drugs and Drug Trafficking Act No 140 of 1992 that section 17(e) requires the imposition of a sentence of imprisonment without the option of a fine (which may be suspended), and a fine with an option of imprisonment may only be imposed in conjunction with such sentence of direct imprisonment and may not be imposed as a self-standing sentence.

Because there was some urgency I have already ordered that the sentence be set aside and replaced with:

> "*A fine of six hundred rand (R600,00) or three (3) months imprisonment and a further two (2) months imprisonment suspended for three (3) years on condition that the accused is not convicted of contravening section 5(a) or 5(b) of Act 140 of 1992 committed during the period of suspension.*"

This sentence is appropriate for the offence committed and does not have the

effect of increasing the sentence already imposed. It is the sentence proposed by the Director of Public Prosecutions.

The above provides the reasons for the order already made.

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D MARAIS
JUDGE OF THE HIGH COURT

I agree:

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G A BORCHERS
JUDGE OF THE HIGH COURT