A61/2006

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISION)

HIGH COURT REF NO 3661

NOT REPORTABLE CASE NO: 159/05

DATE 30/1/06

Magistrate: Phalaborwa

In the matter between

THE STATE

V

THABO MOCHEMA

REVIEW JUDGMENT

Bertelsmann, J

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The accused was eighteen (18) years old and in grade ten (10) at school at the time of his conviction on a count of the unlawful possession of an undesirable dependence producing substance, namely dagga. The total amount found in his possession was twenty eight (28) grams.

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He had a previous conviction for a similar offence. He was sentenced to eight (8) months imprisonment, half of which was suspended on suitable conditions for five (5) years.

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On review, the reviewing Judge enquired from the presiding Magistrate whether there was any proof of the fact that the substance found in the accused's possession was dagga.

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The reviewing Judge further asked whether a certain David, alleged to have been on the scene by the accused should not have been called as a witness.

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Further, it was inquired why no pre-sentencing report was obtained before the accused was sentenced

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The question relating to the proof of the nature of the substance found in the accused's possession arose from the fact that none of the state witnesses qualified themselves as experts in regard to the identification of the substance. Two police officers with ample experience did, however, testify that the substance was dagga. This fact was never challenged in cross-examination, nor did the accused dispute this evidence when he testified in his own defence.

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The Court is indebted to the senior state advocate Pienaar and Ms H E Van Jaarsveld, Deputy Director of Public Prosecutions Transvaal for their very thorough memorandum, which the Court found very helpful. In regard to the proof of the nature of the

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substance they referred the Court to S *v Mosiane* 1989 (3) *SA* 67 *(T)* at 68 to *70; R v Modesa* 1948 (1) *SA* 1157 *(T);* S *v Letimela* 1979 (2) *SA* 332 *(D)* and other authorities to the same effect, namely that if an experienced police officer testifies that a substance found in the possession of an accused person

. constitutes an undesirable dependence producing drug or concoction, and that fact is not challenged in cross examination or during the defence's case, the police officer's testimony constitutes sufficient proof of the fact that it was, as in this case, dagga that was found upon accused.

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The fact that the two police officers did not expressly qualify themselves as experts when they identified the dependence producing substance cannot affect the issue. It is clear from a reading of the record that the accused had no doubt what he was being charged with and did in fact not dispute that the substance he was accused of having possessed was indeed dagga. As a matter of fact, his defence was that the dagga belonged to somebody else.

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The conviction is consequently in order. Even if an attempt had been made to call the person referred to as David as witness, it could hardly have made a difference to the correct finding on the facts that the accused possessed the dagga.

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The sentence questionable, however. There is ample authority, as the office the Director of Public Prosecutions has also underlined, that a minor should not be sentenced to imprisonment unless a pre-sentencing report has been obtained ' S *v* ***Phulwane and others 2003*** (1) ***SACR*** **631** *(T)*

. S *v* ***Z en*** **4** ***ander sake*** **1999** (1) ***SACR*** **427** *(E)'*

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Under the circumstances the conviction is confirmed, but the sentence must be set aside.

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Normally, the matter should be referred back to the trial Magistrate to obtain a pre-sentencing report. However, since the accused was sentenced on the 22 September 2005, the probabilities are that he has already been discharged from prison. To obtain a presentencing report now and have the accused sentenced anew would cause the accused more distressing inconvenience than it would help. I am consequently of the view that the sentence should be altered to read as follows:

"Four (4) months imprisonment of which one month is suspended for five (5) years on condition that the accused is not found guilty of the possession of a dependence producing substance, committed during the period of suspension and for which the accused is sentenced to imprisonment without the option of a fine".

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I would like to add that I would normally regard a short sentence of this nature for the offence of which the accused was convicted as highly undesirable, and would investigate all alternatives to direct imprisonment before sentencing the accused to incarceration. It is only imposed at this stage because the accused has already been sent to prison.

E BERTELSMANN
JUDGE OF THE HIGH COURT

I agree

R D CLAASSEN
JUDGE OF THE HIGH COURT