A126/2012.

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

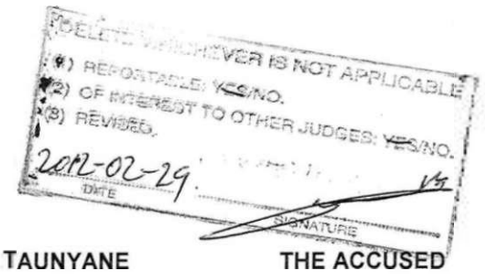
2/3/2012.

CASE NO: K 1041/2011

REVIEW NO. 1/2011

In the matter between:

THE STATE



And

LEHLOGONOLO TAUNYANE **THE ACCUSED**

REVIEW JUDGMENT

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[1] This is a special review of the judgment of the Magistrate Court of Obrholzer. On 2 December 2011 the accused, a 23 year old male, who acted in person, pleaded guilty to a charge of possession of 10g dagga (Cannabis) in contravention of Section 4(b) of Act 140 of 1992 (The Drugs and Drug

Trafficking—Possession of drugs Act 140 of 1992). The dagga was valued at R90. 00.

[2] The Magistrate sentenced him to eighteen (18) months imprisonment of which, six (6) months was suspended for four (4) years on condition that the accused is not convicted of contravening s4(b) Act 140/92 committed during the period of suspension. The dagga was declared forfeited to the State and he was declared unfit to possess firearm.

[3] The accused during the trial was not legally represented as he chose to conduct his own trial, although his rights to a legal representative of his own choice or one provided by the State were duly explained to him.

[4] The magistrate referred the matter for special review, for the setting aside of the conviction and sentence because, at the instance of the public prosecutor, had dealt with the matter in terms of s112(1)(a) instead of s112(1)(b) of Act 51 of 1977.

[5] I subsequently referred the matter to the offices of the Director of Public Prosecutions to opine on it. The senior State Advocate P.N. Ngcobo has since obliged me with his opinion, with which the Deputy Director of Public Prosecutions S. Mlambo agrees, for which I am grateful.

[6] In the matter of *S v Gunda* 2007 (1) SACR (NC) 75 (CPD) the court stated that "[3] The provisions of s112(1)(a) are clearly to the effect that, where an accused person has been convicted on the basis of such provisions, no sentence of 'imprisonment or any other form of detention' will be competent." As a matter of fact, what s112(1)(a) proscribes is a sentence of imprisonment or detention without an option of a fine.

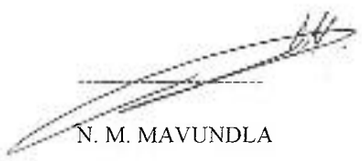
[7] *In casu,* the sentence of eighteen (18) months imprisonment imposed against the accused was without an option of a fine. The sentence imposed was therefore incompetent, irregular and not in accordance with justice and stands to be set aside in terms of s304(2)(ii).

[8] The director of public prosecutions recommended that the sentence should be set aside and the matter be remitted to the magistrate for re-sentencing.

[9] The accused was sentenced on 2 December 2011 and has most possibly gained some credits to date. The magistrate, when he deals with the matter, in terms of s112(1)(b), as he should have done, when he imposes sentence, must take into account the period already served by the accused. In order to meet this aspect, he shall have to order the sentence to be retrospective to 2 December 2011 to avert any prejudice to the accused.

[10] In the result I make the following order:

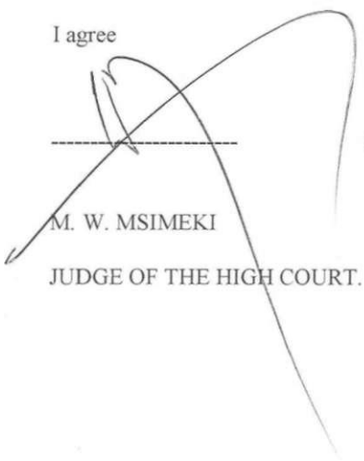
1. That the proceedings of 2 December 2011 are *in toto* set aside;
2. That the case is remitted to the magistrate for retrial and proper sentence.



N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree



DATED THE 24 FEBRUARY 2011

M. W. MSIMEKI

JUDGE OF THE HIGH COURT.