A278/2016.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 5/6/16.

Date: 26 April 2016

MAGISTRATE	**: Ms J.S Naidoo**
HIGH COURT REFERENCE NO.	**: 536/15**
MAGISTRATE'S SERIAL NO.	**: 19/15**
REVIEW CASE NO.	**: SA98/15**

THE STATE v IFEANYI HENRY FRANCE OKANKWA

REVIEW JUDGMENT

INTRODUCTION

[1] This is a review of a conviction in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act").

[2] The accused was found in possession of 1,76 grams of cannabis ("dagga") and 14.40 grams of methcathinone. He appeared before in the Magistrate's Court, Secunda where he was charged with, and convicted of, two counts of contravening the provisions of Section 4(b) read with Sections 1,13,17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992,("the Act"), namely the unlawful possession of dagga and the unlawful possession of methcathinone.

[3] The Acting Senior Magistrate, Evander, ("the Acting Senior Magistrate") under whom the Secunda Magistrate's Court falls, and over which he is tasked to perform judicial quality control, in transmitting this case for special review, expressed reservation as to the appropriateness of the sentences imposed by the Magistrate who heard this matter.

[4] In a memorandum which accompanied the record, this Court's attention was drawn to amongst other things the following:

4.1 the rule against the splitting of charges;
4.2 the wording of the sentence imposed by the Magistrate; and
4.3 the Section 300 order.

[5] It is convenient to now give a brief summary of the background facts in the matter.

BACKGROUND FACTS

[6] The accused, a 27 year asylum seeker, was arrested on 30 January 2015. The drugs mentioned in paragraph 2 above were found on his person.

[7] At the hearing of the matter, the accused, who had prepared a written statement in terms of Section 112(2) of the Criminal Procedure Act, and who was represented by an attorney, pleaded guilty to the two charges which were framed as follows:

"Count 1 : Possession or use of drugs in that upon or about 30 January 2015 and at or near Secunda, in the district of Secunda, the accused did wrongfully have in his possession or use

an undesirable and dependence producing substance as listed in Part 3 of Schedule 2 of [the Act], to wit 14,4g of Methcathinone.

Count 2 : Possession or use of drugs in that upon or about 30 January 2015 and at or near Secunda, in the district of Secunda, the accused did wrongfully have in his possession or use an undesirable dependence producing substance as listed in Part 3 of Schedule 2 of [the Act], to wit 1,76g of cannabis."

[8] Having satisfied herself that all the elements of the crime had been admitted and that the accused had the requisite intention to plead guilty, the Magistrate found the accused, who had a previous conviction, guilty on both charges and, after being addressed on the issue of mitigation, imposed the following sentence:

"Five years imprisonment wholly suspended for 5 years for a period of five years on condition that the accused does not contravene section 4(b) read with section 13, 17, to 25 and 64 of the Drugs and Drug Trafficking Act, 140 of 1992 during the period of suspension and further in terms of section 300 of Act 51/1977 the accused is to compensate SAVF Louis Hildebrand with the amount of R20 000.00 as agreed upon on or before the 31 July 2015. In terms of section 103(2)(b) of Act 60 of 2000 the accused is declared unfit to possess a firearm."

[9] I now turn to deal with the merits of this matter.

WAS THERE AN IMPROPER SPLITTING OF CHARGES?

[10] As can be noted from the charges listed in paragraph 7 above, the drugs are described as dependence producing and are both listed in Part 3 of Schedule 2 of the Act. In a matter where an accused had been convicted of dealing in dagga and mandrax and sentenced, separately, for each offence, the Court in *S v Diedericks* 1984 (3) SA 814 at 817 E - G having

found that both drugs were dependence-producing, had to distinguish between a legitimate and an impermissible combination of convictions. Baker J in *Diedericks supra*, stated that reference to dagga and mandrax in the charge sheet was put there merely to enable the accused to know in what sort of substance he has allegedly and illicitly been dealing. The learned Judge found that dealing in dagga and methaqualone on the same occasion was in reality one transaction with a single intent. The reasoning and conclusions in *Diedericks* were followed by the Full Bench of the Natal Provincial Division in *S v Mkhize and Others* 1987 (4) SA 430 where Law J held that a person found in possession of dagga and methaqualone, at one and the same time, in circumstances not amounting to dealing, was guilty of one offence. The ratio of *Diedericks* was also followed by the Full Bench of the Cape Provincial Division in *S v Maansdorp and Another* 1985 (4) SA 235 (C) and the Full Bench of the Transvaal Provincial Division in *S v Swartz* 1986 (3) SA 287 (T).

[11] I accordingly find that, based on the authorities cited above, the accused was incorrectly charged. This led to a duplication of convictions. The accused was guilty of only one offence. In the result, I propose that the separate convictions are set aside and replaced by a conviction of one count of possession of cannabis and methcathinone in contravention of Section 4(b) read with Sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992.

IS THE SENTENCE PROPERLY WORDED AND APPROPRIATE IN THE CIRCUMSTANCES?

[12] The sentence imposed on the accused consists of three parts. First: five years imprisonment which is conditionally wholly suspended for five years; Second: payment of the sum of R20, 000.00 to the Non-Governmental Organisation named in the sentence, and Third: declaring the accused unfit to possess a firearm.

[13] Regarding the first part of the sentence, it is worth noting that the Magistrate treated both counts as one for purposes of sentence. Despite having consolidated the two counts into one, I find that that part of the sentence is appropriate.

[14] The Acting Senior Magistrate, in his helpful memorandum referred to in paragraph 4 above, correctly in my view, suggested that the phrase " ... *the accused does not contravene* ... " in the second line of the sentence should be replaced with the words " ... *the accused is not convicted of* [the named offence]...*committed* ... I agree that the first portion of the sentence falls to be amended.

[15] In the second part of the sentence, the Magistrate invokes, incorrectly, Section 300(1) of the Criminal Procedure Act ["the Act"] to order the accused to compensate SAVKF Louis Hildebrand with an amount of R20, 000.00 by a certain date.

[16] Section 300(1) of the Act is only applicable where the offence caused damage to a person or loss of property. The person, who is so damaged or has lost property, can bring an application to be compensated, or the prosecutor can, acting on the instructions of that person, bring such an

application on his or her behalf. The record in this matter does not show that such an application was made during the proceedings in Court. Also, no damage or loss of property was sustained by anyone in this matter,nor SAVF Louis Hildebrand to whom the Magistrate ordered the accused to pay an amount of R20 000.00.

[17] The record also reveals that the Magistrate, in chambers rejected a plea and sentence agreement concluded by the accused and the State in terms of Section 105 A of the Criminal Procedure Act. Notwithstanding this rejection of the agreement, the Magistrate made an order of compensation which was part of the Plea and Sentence Agreement she had rejected.

[18] The Magistrate acted irregularly in issuing that order of compensation. The Plea and Sentence Agreement should have been placed on record, whereafter the Magistrate's views should have been conveyed to the parties. The procedure set out in Section 105(A) 9(b) of the Criminal Procedure Act should then have been followed. This did not happen.

[19] I am of the view that we should interfere with this part of the sentence and set it aside.

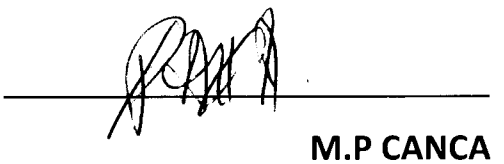
[20] I propose that we do not interfere with that portion of the sentence declaring the accused unfit to possess a firearm.

[21] In the event, I propose the following order:

1. The separate convictions on counts 1 and 2 are replaced with a conviction of one count of possession of cannabis and methcathinone in contravention of Section 4(b) read with Sections 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992.
2. The sentence is amended and substituted as following:

Five years imprisonment wholly suspended for 5 years on condition that the accused is not convicted of a contravention of Section 4(b) read with Sections 1,13,17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992, committed during the period of suspension;

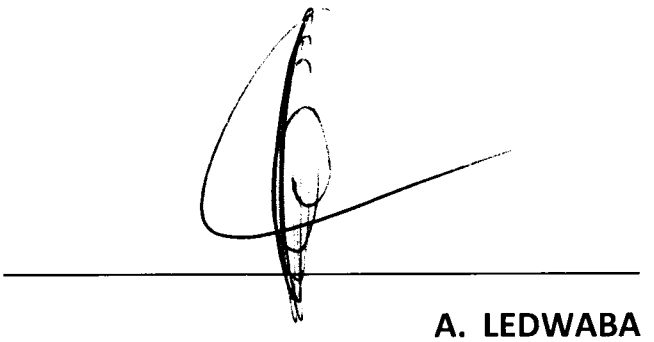
3. The accused is declared unfit to possess a firearm in terms of Section 103(2)(b) of Act 60 of 2000.



M.P CANCA

Acting Judge of the High Court of South Africa Gauteng Division, Pretoria

I agree and it is so ordered



A. LEDWABA

Deputy Judge President

High Court of South Africa Gauteng Division,Pretoria