KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

IN THE REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case no: R952/10

In the matter between:

THE STATE

Vs

THANDEZILE AGTRINETH GCOBA

REVIEW JUDGMENT

MADONDO J

[1] Upon a plea of guilty the Magistrate of Dundee convicted the accused of dealing in 13.35 kilograms of dagga in contravention of section 5(b) of Drugs and Drug Trafficking Act no. 140 of 1992 (the Act) and, in terms of section 17 (e) of the Act, she was sentence to five (5) years imprisonment. In addition *to the sentence of imprisonment she was ordered to pay a fine of R4000.00 or to undergo twelve (12) months' imprisonment in default of payment of the fine.*

[2] When the Senior Magistrate was doing his routine checking he came across this sentence and he took the view that it was incompetent. He then raised the matter with the Magistrate who had passed the sentence. The latter, in

the covering letter to the review record dated 23 August 2010 addressed to the Reviewing Judge, states that he construed the provisions of section 17(e) as allowing him, in addition to the sentence of imprisonment, to impose a fine with an alternative further term of imprisonment in default of payment if he considered such sentence appropriate.

[3] This matter served before me on automatic review in terms of section 304 of the Criminal Procedure Act, 51 of 1977 (the Criminal Procedure Act) on the question of interpretation of section 17 (e) of the Act. The section reads:

> *"17. Penalties*
>
> Any person who is convicted of an offence under this Act shall be liable-
>
> *a)* ...
>
> *b)* ...
>
> *c)* ...
>
> *d)* ...
>
> *e)* *In the case of the offence referred to in section 13 (f) to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the Court may deem fit to impose."*

[4] The wording of this section is somehow perplexed and ambiguous and as a result it is often misconstrued. The direct consequence thereof, is the

conflicting viewpoints expressed in various decided cases on its interpretation and application.

[5] In S v Mohome 1993 (1) SACR 504(T), where the accused had been convicted of dealing in dagga in contravention of section 2(a) of Abuse of Dependence Producing Substances and Rehabilitation Centres Act, 41 of 1971 and ordered to pay a fine of R500.00 or six months' imprisonment. On review Smit J at 506d-e said the following:-

> "Die gevegtrekking waartoe ek gekom het beteken nie dat die nie oplê van 'n boete beklemtoon moet word deur nie maar hou slegs in dat benewens enige boete met altenatief gevangenisstraf met of sonder opskorting en sonder die keus van 'n boete opgelê moet word. In die onderhandige geval he t die landdros slegs die ses maande gevangenisstraf as 'n alternatief tot die boete van R500.00 opgeligde en tot daardie mate is vonnis myns insiens nie ooreenkonstig die reg nie. Benewens die opgeledge vonnis was die landdros ook verplig on gevangenisstraf (met of sonder opskorting) op te lê."

The sentence imposed by the Magistrate was set aside and it was replaced by the sentence of six months' imprisonment which was wholly suspended on usual conditions. In addition, he was sentenced to pay a fine of R500.00 or six months' imprisonment in default of payment of the fine.

[5] In S v Zwane 2004(2) SACR 291(N), the accused was convicted of dealing in dagga in contravention of section *5(b). A fine of R3000.00 was imposed and in default of payment thereof, the accused was ordered to undergo fifteen (15) months' imprisonment. On review, the sentence imposed was held to be incompetent for failure to comply with a penalty clause.*

[6] In S v Mqikela 2005(2) SACR 397(E) at 398,399 b and 401 c-e, the accused was convicted in the Magistrates Court of dealing in dagga in contravention of section 5(b) of the Act and was sentenced, in terms of section 17(e), to a partly suspended term of imprisonment. The question on automatic review was the correctness of the sentence in the light of the provisions of section 17(e) of the Act. The Court held that the Magistrate was in terms of section 17(e) obliged to impose a sentence of imprisonment without the option of a fine (which might be fully or partially suspended), and, in addition, the section allowed him to impose a fine, to which he might add an alternative of imprisonment in default of payment in terms of section 287(1) of the Criminal Procedure Act.

[7] Such an interpretation was approved and adopted in S v Msusa (2009) JOL 23093(tk) as being applied throughout the country since the decided cases on the subject as cited below were applied in Mqikela case and found to have been correctly decided:

S v Mazibuko 1992 (2) SACR 320(W); S v Mahome 1993(1) SACR 504(T); S v Molotsane 1993(1) SACT 502(O); S v Van Zyl and Others 1992(2) SACR 101 (c) and , S v Zwane 2004 (2) SACR 291(N).

[8] In Msusa, that Magistrate had imposed the fine with an alternative imprisonment sentence in default of payment. It was held that the Magistrate had obviously disregarded the peremptory language used in the penalty clause for the imposition of a term of imprisonment.

[9] However, a different approach was adopted in S v Fedani 2000(1) SACT 345(E) ; S v Sokweliti 2002(1) SACT and S v Mahlangu 2004(1) SACT 280(T)

632 (tk):

[10] In Fedani, the accused was convicted of unlawful dealing in 83 grams of dagga in contravention of section 5(b) of the Act. He was sentenced to R3000.00 or 12 months' imprisonment, half of which was suspended for five years on usual conditions.

[11] In Mahlangu, on review the Court reduced a sentence of imprisonment with the option of the fine and by implication, it confirmed the propriety of the sentence imposed.

[12] In Sokweliti, the accused was convicted in a Magistrate's Court of unlawful dealing in 5.8 kilograms of dagga. She was sentenced to six months' imprisonment and to a fine of R2500.00 which was wholly suspended for three years on usual conditions. On review, it was held that the sentence was unduly harsh and was replaced with a sentence of R2500.00 or six months' imprisonment, wholly suspended for three years. However, the sentence imposed by the Judge of a fine of R2500.00 or six months' imprisonment which was wholly suspended was incompetent. The same can also be said of the sentences in Fedani and Mhalangu.

[13] For dealing in dagga in contravention of section 5(b) on construction the penalty clause makes the imposition of the term of imprisonment mandatory. Though the section also makes provision for a fine, it must be imposed in addition to the sentence of imprisonment not in substitution thereof. See Mqikela, supra, at 399C. In Fedani, Mahlangu and Sokweliti a fine was imposed as an alternative to imprisonment. It, therefore, *follows that were in 'correctly' decided and clearly wrong. They are at odds with the proper construction of the provisions of section 17 (e).*

[14] Though the penalty clause makes provision for the mandatory imposition of the sentence of imprisonment for dealing in dagga, it does not preclude the total or partial suspension thereof. See Mqikela at 399b.

[15] In the present case, when imposing the sentence of imprisonment without the option of a fine with an alternative further sentence of imprisonment in default of payment of the fine the Magistrate acted within the ambit of the provisions of section 17(e) of the Act. It is always desirable to impose alternative imprisonment

when imposing a fine since failure to pay may lead to inconvenience and unnecessary proceedings and section 287(2) of the Criminal Procedure Act. See also S v Randua 1961(3) SA 545(O) 546 and S v Relashe 1970(2) SA 724 (O). Therefore the Magistrate duly complied with the provisions of section 17(e) and in my view, no legitimate criticism can be leveled against the propriety of the sentence imposed.

[16] However, the same cannot be said of its cumulative effect. Though the coupling of two punishments, ie. sentence of imprisonment and the fine with an alternative further imprisonment in default of payment of the fine signals the seriousness with which the Magistrate viewed the offence committed, the disturbing feature of the sentence imposed is its severity.

[17] Indeed, I am in agreement with the view expressed in Sokweliti that the sentences of both imprisonment and a fine have to be reserved for very serious cases, ie where the accused is involved in the making of profits out of drug

dealing. But, in Mazibuko, supra, it was held that in assessing appropriate sentence, there are two major factors that require emphasis. The first is that the accused was in possession of a considerable amount of dagga, over five (5) kilograms. The second is the reason for selling dagga. Following the guidelines laid down in Mazibuko before a Presiding Officer imposes a sentence in drug cases, he or she must first investigate and assess the nature and circumstances of each particular case, in order to come to a correct decision.

[18] In the present case, the accused was dealing in 13.35 kilograms of dagga which was by far over five (5) kilograms, a yardstick. She had previous conviction for dealing in dagga and in respect of which she was sentenced to five (5) years imprisonment and of which one year was suspended on *usual conditions. Those were aggravating features of the accused's case. On the other hand, the mitigating features of her case were that she had pleaded guilty as a sign of remorse. She was selling dagga in order to support her children. According to her* she was selling dagga under compelling circumstances. It therefore, follows that she did not sell dagga in order to make profits out of dagga dealing, but for the

survival of her family. In exchange for dagga she was given food. She had tried selling tomatoes and clothes but she did not make any profits. In the premises, she could hardly be described as a drug baroness who deserved severe punishment. Moreover, she was selling dagga not cocaine, mandrax and heroin or LSD.

[19] Nevertheless, she must be encouraged and assisted to learn an honest living and refrain from selling dagga by to imposition of a more fitting a appropriate sentence. Surely, that will help her to reflect on her unlawful activities. In the light of her previous conviction and the amount of dagga she had in her possession, I am of the view that a direct term of imprisonment was an appropriate sentence. However, the addition of fine to it with an alternative of further imprisonment in default of payment of the fine rendered the imposed sentence grossly out of proportion to the gravity or magnitude of the offence committed.

[20] Fine shall only become payable after the expiration of the sentence of imprisonment. Nor was it inquired into her ability to pay a fine, after the expiration of her imprisonment sentence, prior to the imposition of a fine notwithstanding all this, her inability to pay a fine can reasonably be inferred from t he fact that when selling dagga she was living from hand to mouth. It, therefore, stands to reason that after the expiration of the sentence of imprisonment she shall serve the alternative imprisonment, for it shall only become operative after it has been established that the fine has not been paid.

[21] Requiring her to pay the fine, after the expiration of the five year term of imprisonment, or in default of the payment of the fine to serve the alternative further term of imprisonment, renders the punishment imposed unduly harsh, cruel and grossly disproportionate to the length of the imprisonment merited by the offence committed. Accordingly, as such it goes without saying that it constitutes a violation of section 12(1)(e) of the Constitution of the Republic of South Africa Act no.108 of 1996 (the constitution). On automatic review the

Court is duty bound to see to it that justice is done both to the convicted person and to the State. See S v Zulu 1967(4) SA 499(T) at 501F.

[22] Section 12(1) (e) of the Constitution provides:

> *"Freedom and security of the person*
>
> 12. (1) Everyone has the right to freedom and *security of the person, which includes the right –*
>
> *(a)* ...
>
> *(b)* ...
>
> *(c)* ...
>
> *(d)* ...
>
> *(e)* *not to be treated or punished in a cruel, inhuman or degrading way."*

The cumulative effect of the sentence imposed in the present case puts it squarely within the ambit of a cruel, inhuman and degrading punishment as envisaged in section 12(1)(e) of the Constitution Inevitably, as such, it must not be allowed to stand.

[23] Since the Magistrate had considered it appropriate to add dine to the direct term of imprisonment, in the circumstances of this case, in order to mitigate

the cumulative effect of the imposed sentence he ought to have fully suspended the sentence of imprisonment on usual conditions and added to it a fine with an alternative further imprisonment in default of the payment of the fine.

[24] In the result, conviction is confirmed but the sentence is set aside and replaced by the following:

*Accused is sentenced to five (5) years' imprisonment, wholly suspended for a period of three (3) years on condition that she is not convicted of dealing in dagga in contravention of section 5(b) of the Act, committed during the period of suspension. Further, she is ordered to pay R4000.00 fine or to undergo 12 months' imprisonment in default of payment of the fine. The sen*tence is antedated to 28 July 2010.