

IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION  
PIETERMARITZBURG

A559//2016

Review No: 11/2016

High Court Ref No: DR192/16 and DR 193/16

23 May 2017

In the matter between:

The State

versus

Thokozani Eugene Xulu

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Review Judgement

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Lopes J

[1] This is an application which comes before me, in terms of s 304 (4) of the Criminal Procedure Act, 1977. The history of this matter which reveals the reason for the review application is as follows:

- (a) On the 3<sup>rd</sup> November 2014 in the Mtunzini Magistrates' Court, Mr Xulu was convicted under case number A424/2014 in the Mtunzini Magistrates' Court of contravening s 4 (b) of the Act. He was fined R900 or to undergo 90 days' imprisonment of which R600 or 60 days' was suspended for five years on condition that he was not convicted of contravening s 4 (b) committed during the period of suspension.
- (b) On the 11<sup>th</sup> May, 2015 and in the Mtunzini Magistrates' Court, Mr Xulu was convicted of one count of contravening the provisions of s 4(b) of the Drugs and Drug Trafficking Act, 1992 (the Act) in that he was in

possession of 33 grams of dagga. He was also convicted of contravening s 4 (a) of the Act because on the same day he had in his possession 0.15 grams of chlorphentermine (commonly referred to as 'wunga').

- (c) On count one Mr Xulu was sentenced to pay a fine of R1 500, or in the alternative to undergo 60 days' imprisonment. A further 4 months' imprisonment was suspended for five years on condition that he was not again convicted of contravening s 4 (b) of the Act, which offence was committed during the period of suspension. On count two, he was fined R3 000 or to undergo six months' imprisonment, the whole of which was suspended for five years on condition that he was not again convicted of contravening s 4 (a) or 5(a) of the Act, which offence was committed during the period of suspension.
- (d) On the 15<sup>th</sup> April 2016 and under case A559/2015, again in the Mtunzini Magistrates' Court, Mr Xulu was convicted of contravening the provisions of s 4 (b) of the Act, as he was found in possession of 0.244 grams of dagga.
- (e) On the 29<sup>th</sup> April 2016 he was sentenced to pay a fine of R2 000 or undergo 60 days' imprisonment, with a further four months' imprisonment being suspended for five years on condition that he was not again convicted of contravening s 4 (a) or 4 (b) of the Act, which offence was committed during the period of suspension.

[2] On the 20<sup>th</sup> May 2016 and under case number A440/2014 in the Mtunzini Magistrates' Court, the state sought to put into operation the sentences which had been suspended. However:

- (a) The learned Magistrate ordered that the suspended sentence of R1 500 or 60 days' imprisonment imposed on the 11<sup>th</sup> May 2015 be brought into operation. This was clearly an error because the sentence which the learned Magistrate put into operation was

the sentence which was operative, and not the sentence which was suspended.

- (b) The learned Magistrate also put into operation the sentence of R3 000 or six months' imprisonment, which was the second count imposed on the 11<sup>th</sup> May 2016. This was also an error because the sentence of R3 000 or six months' imprisonment which was suspended for five years on condition that Mr Xulu not again commits an offence in contravention of s 4 (a) or 5 (a) of the Act. The offence which triggered the implementation of the suspended sentence was an offence in terms of s 4 (b) of the Act.
- (c) In the premises, neither of the suspended sentences should have been put into operation. The first because it referred to the wrong part of the sentence, and the second because the suspended sentence was not made conditional upon a contravention of the crime of which Mr Xulu was convicted under case number A559/2015.
- (d) In addition, under case number A424/2014 the learned Magistrate incorrectly put into effect a suspended sentence of R900 or 90 days' imprisonment. This was incorrect because, of the sentence of R900 or 90 days' imprisonment, R600 or 60 days' was suspended for five years on condition that Mr Xulu was not convicted of contravening s 4 (b) of the Act. All that could have been put into operation on the 20<sup>th</sup> May 2016 was the R600 or 60 days' imprisonment:

[3] Despite what has been said in the application for special review (Special Review 11/2016B) it appears that the incorrect implementation of the suspended sentences was done under case number A440/2014. In the light of the apparent confusion I intend to make an order which will cater for either case.

Accordingly I make the following order:

- a) The order of the 11<sup>th</sup> May 2016 putting into operation the suspended sentence of R1 500 or 60 days' imprisonment;
- b) the order of the 11<sup>th</sup> May 2016 putting into operation the suspended sentence of R3 000 of six months' imprisonment; and
- c) the putting into operation of the suspended sentence of R900 or 90 days' imprisonment on the 20<sup>th</sup> May 2016 in relation to case number A424/2014.

are all reviewed and set aside whether those suspended sentences were put into operation under case number A440/2014 or A559/2015.

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Graham Lopes J

I agree.

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Mnguni J