

SOUTH AFRICA / JUDGMENT

Nkosi v S (A465/2011) [2012] ZAGPPHC 326 (30 November 2012)

[2012] ZAGPPHC 326**COURT**

North Gauteng High Court, Pretoria

BEFORE

S. A. M Baqwa, F. Du Toit

CASE / FILE NUMBER

A465/2011

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Source record**NOT****REPORTABLE****IN****THE HIGH COURT OF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)****Case****no:A465/2011****DATE:30/11/2012****In****the matter between:**

THEMBA

NKOSI.....APPELLANT

and

THE

STATE.....RESPONDENT

JUDGMENT**BAQWA J,**

- [1] The Appellant herein pleaded guilty and handed in a section 112(2) statement confirming his guilt. He admitted all the elements of the crime.
- [2] The facts are briefly as follows: He was driving his motor vehicle, a Ford Courier bakkie on 22 July 2011 from Swaziland to Johannesburg.

- [3] He was stopped and searched at the Mahamba border gate, Piet Retief and 20kg of dagga was found at the back of his vehicle. He admitted that the dagga was his and he was taking same to Johannesburg. He admitted being aware of the unlawfulness of his actions. The Court "a quo" applied the statutory provisions relating to the quantity of dagga and convicted him of dealing in dagga.
- [4] He was sentenced to serve a term of four years imprisonment and his motor vehicle was forfeited to the state.
- [5] The personal circumstances of the Appellant are as follows. He was 37 years old at the time of commission of the offence. He is single and stays with the mother of one of his children. He has four children aged 15, 10, 7 and 3 years. The children are from different mothers who are unemployed except for one. The children are dependent on the Appellant for support. The Appellant was employed until the time of his arrest.
- [6] The Appellant admitted a previous conviction of a similar nature to the charge on which he was convicted having been convicted of that offence in 2000.
- [7] It has been submitted on Appellant's behalf that having stayed away from crime for a period in excess of ten years, he ought to have been treated as a first offender.
- [8] As against this submission, the Respondent submits with regard to the earlier conviction that the Appellant was sentenced to two years imprisonment as well as a further suspended sentence and that six years after his suspended sentence expired, he was again convicted.
- [9] These are all circumstances which the Court "a quo" seems to have taken into account whilst not forgetting the relevant

provisions of the law in imposing the sentence that is now being appealed against.

- [10] The prescribed sentence in terms of section 17 of the Drugs and Trafficking Act 40 of 1992 is imprisonment not exceeding 25 years or imprisonment coupled with a fine. The magistrate applied the provisions of section 25 of Act 140 of 1992 and ordered the motor vehicle forfeit to the State. It is submitted by the Appellant and I accept that the forfeiture of the motor vehicle is part of the punishment.
- [11] The question to decide is whether bearing in mind the facts of the offence, the circumstances of the Appellant and the interests of society, the sentence imposed by the Magistrate is strikingly inappropriate.
- [12] It is trite law that in every appeal against sentence, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode such discretion hence the further principle that the sentence should be altered in exceptional circumstances.

[13] Whilst the latter statement is correct, the court has to take into account the triad: the crime, the criminal and the society. The Appellant who has young dependants had stayed clean for a period of just over ten years. This fact cannot be ignored as a mitigating

factor. The fact is, the most severe sentence is not necessarily the most appropriate. Most prisoners have to return to society one day, and the longer the sentence the more likely society is to be troubled by that person.

See: SvS 1997(3) SA 830 G-H

S v Skenjana 1985(3) SA 51 at par 64.

[14] Whilst not minimising the seriousness of the crime, and taking in account all the circumstances of this case, I find it appropriate to temper sentence with a measure of mercy by adding the alternative of a fine to the sentence imposed by the Court "a quo".

[15] In the result I propose that the following order is made:

15.1 The conviction of the Appellant and the forfeiture of the Appellant's vehicle to the State is confirmed.

15.2 The appeal against sentence is upheld.

15.3 The sentence of four years imprisonment is set aside and substituted with the following.

15.4 The Appellant is sentenced to pay a fine of Ten Thousand Rands (R10, 000.00) failing which to undergo a term of four (4) years

imprisonment.

30 November 2012

It is so ordered:

S. A. M Baqwa

(JUDGE OF THE HIGH COURT)

I agree:

F. DU TOIT

(ACTING JUDGE OF THE COURT)

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