

SOUTH AFRICA / JUDGMENT

S v Gcoba (2011 (2) SACR 231 (KZP)) [2010] ZAKZPHC 75; R952/10 (18 November 2010) [2010] ZAKZPHC 75

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Madondo

CASE / FILE NUMBER

R952/10

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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-

... .. 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 gevogtrekking 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 alternatief 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 ooreenkomstig 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.

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