

SOUTH AFRICA / JUDGMENT

S v Madibane (LR/38/2013/PWC) [2013] ZAGPPHC 482; 2014 (2) SACR 88 (GP) (28 November 2013) [2013] ZAGPPHC 482

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann

CASE / FILE NUMBER

LR/38/2013/PWC

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IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG NORTH

DIVISION, PRETORIA

High

Court Ref. No.: 896 Review

Case

No. LR/38/2013/PWC

DATE:

28 NOVEMBER 2013

In the matter

between:

THE STATE

versus

GOODBOY

MADIBANE Accused

REVIEW

JUDGMENT

1. The accused was charged in the Magistrate's Court for the district of Mhala held at Mkhulu with the offence of dealing in cannabis or dagga, as the undesirable dependence - producing substance is more popularly known - in

contravention of section 5 (b) of Act 140 of 1992. Although the charge sheet records that the amount of dagga the accused dealt in was 0,188 grams, the magistrate's notes refer to a quantity of 10 match boxes that the accused allegedly offered for sale when he was apprehended.

2. The accused was a first offender and was unrepresented. In spite of his plea he was convicted and the evidence clearly shows that the conviction is in order.
3. The magistrate sentenced the accused to the payment of a fine of R 6 000, 00 or, in default thereof, 3 years' imprisonment.
4. The fine was imposed in spite of the accused's unchallenged evidence in mitigation under oath that he was unable to pay the fine because of his meagre and uncertain income as a self-employed brick maker.
5. On review, the magistrate was asked by the reviewing judge whether he had accepted the accused's evidence under oath that he did not have money to pay a fine or not. While the court never put it to the accused that his evidence that he could not pay a fine was disbelieved by the presiding officer, it is clear from the reasons provided by the magistrate that he did not lend credence to the accused's assertion:

'It is so difficult to get the truth from convicted person (sic) regarding the issue of paying fine (sic) as nearly all of them will give a false answer by saying I am self employed ('sic), cleaning premises, moulding bricks, building houses with no fixed salary per month, but once punishment has been meted out, someone will emerge from nowhere and pay fine.' ('sic).

6. The fact that the accused did not have any money of his own appears to be borne out by the fact that bail was paid by a third party on his behalf prior to the commencement of the trial, and that his fine was paid (at least in respect of the initial payment of half the sum of R 6 000, 00 after arrangements had been made to pay the fine in instalments) by his brother.
7. The magistrate erred in the manner in which he dealt with the accused's evidence in mitigation. If he was sceptical about the accused's assertions, particularly when made from the witness box, he was obliged to disclose his misgivings to the accused immediately. His failure to do so put the accused at a significant disadvantage and denied the accused the right to address every issue the presiding officer might consider for or against him prior to imposing sentence: R. v Shuba 1958 (3) SA 844 (C); S v Mabala 1974 (2) SA 413 (C) on 419H - 420C; S v Kramer & Others 1991 (1) SACR 25 (Nm) at 28 d-e. These matters all deal with unchallenged submissions made from the Bar which should be accepted by the trial court unless the court conveys its reluctance to do so to the defence at the time the submissions

are made; they apply a fortiori to unchallenged evidence under oath. The magistrate's failure to express his doubts concerning the accused's veracity in this respect rendered the sentencing proceedings unfair and prejudicial to the accused.

8. There are further grounds to interfere with the magistrate's sentence, which is manifestly excessive and fails to accord appropriate weight to the accused's personal circumstances and the small amount of dagga involved in the commission of the offence. The magistrate conceded as much when he was questioned on this issue by the reviewing judge.
9. The court is indebted to advocate E Leonard, Deputy Director of Public Prosecutions, North Gauteng, Pretoria, and to State Advocate Coetzer, whose helpful comments were of significant assistance in determining an appropriate

sentence. Section 17

- (e) of Act 140 of 1992 obliges the court upon conviction of an accused of the offence of having contravened section 5 (b) of the Act to impose a period of direct imprisonment, which may however be suspended in its entirety, see Marais, J's thorough discussion of this issue in *S v Mlambo* 2007 (1) SACR 664 (W).
10. Given the small amount of dagga and the accused's personal circumstances, the State suggests that an appropriate sentence would be three months' imprisonment suspended in its entirety. I agree with this approach, but would emphasize in conclusion that it is the trial court's duty to inform an undefended accused of his right to apply for any fine to be deferred or ordered to be paid in instalments: *S v Maluleke* 2002 (1) SACR 260 (T) at 263 d-g. This is another respect in which the trial court erred. Incidentally this decision also underlines the magistrate's duty to disclose any doubts he or she may harbour regarding any communication the accused has made to the court immediately, on record.

The following order is made:

1. The conviction is confirmed;
2. The sentence is set aside and substituted with the following:

"Three months' imprisonment wholly suspended for five years on condition that the accused is not convicted of contravening section 5 (b) of Act 140 of 1992 committed during the period of suspension."

3. The fine, or part thereof, already paid by the accused is to be repaid to him immediately.

Signed at Pretoria on this 20th day of November 2013.

E BERTELSMANN

Judge of the High Court.

I agree.

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