

SOUTH AFRICA / JUDGMENT

S v Malmone and Another (A961/14, 826/14) [2015] ZAGPPHC 17 (9 January 2015) [2015] ZAGPPHC 17

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann, K.M. Kubushi

CASE / FILE NUMBER

A961/14, 826/14

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

Case Nos: A961/14

826/14

Date: 9 January 2015

In the matters between:

THE STATE

versus

TSHEPO MALMONE (826/14)

and

BONGANI MICHAEL NDLOVU.....Accused

REVIEW JUDGMENT

- Both matters have been referred to this Court as special reviews in terms of section 304 (4) of Act 51 of 1977, the Criminal Procedure Act ("CPA"). In both instances the irregularities that have been pointed out by the Acting Senior Magistrate of the Magistrate's Court for the district of Benoni are identical. The two matters were presided over by the same acting Magistrate and in both matters the accused faced charges of possession or using an undesirable dependence producing substance listed in Part 1 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992, namely cannabis or, more colloquially, dagga. Both were

sentenced on the same day. In both instances they appeared for the first time on the 11th September 2014, at which stage the matter was postponed and an attorney, apparently instructed by Legal Aid, placed on record that he would conduct their defence. The accused were released on warning.

2. Both matters were postponed to the 30th September 2014. When the accused appeared they were unrepresented in spite of having had the assistance of the attorney at the previous hearing. In both instances they indicated that they would plead guilty to the charge of possession of the prohibited substance and that they would conduct their own case.
3. The court did not inquire, in either event, why the attorney who had first appeared for them was not present. The presiding officer and the prosecutor accepted that the accused would continue to participate in the proceedings without legal representation.
4. Both accused were first offenders and neither raised the issue of legal representation. In neither charge, which was duly put to the accused, was the amount of the undesirable dependence producing substance found in the accused's possession mentioned. Both accused pleaded guilty.
5. The trial magistrate proceeded to investigate the accused's personal circumstances before pronouncing judgment, and before formally recording that the accused were found guilty after the State accepted the plea proffered by both accused. In one instance the fact that the accused had no previous convictions was addressed before the formality of a finding of guilty was recorded. After delivering a little homily to both accused they were each sentenced to the payment of a fine that was suspended without imposing an alternative of imprisonment in case the fine remained unpaid.
6. The Acting Senior Magistrate correctly pointed out in her submission of these two matters for special review that the trial magistrate failed to ensure that the accused fully understood the charge and that they admitted all the elements of the statutory offence of having transgressed section 4(b) of Act 140 of 1992. She also correctly underlines that the magistrate failed to explain the accused's rights to address the court in mitigation of sentence and of a review or appeal after conviction.
7. In addition, the manner in which the fine was imposed is incorrect. A wholly suspended fine must carry an alternative option of imprisonment if it remains unpaid. Any sentence that is suspended must be suspended for a specific period not exceeding five years on specific conditions, the transgression of which may lead to the termination of the suspension.
8. It is therefore clear that a number of irregularities have occurred in these two matters. The Senior Magistrate, who went far beyond the call of duty in investigating and analysing the errors that occurred in these proceedings, suggests that they should be set aside in their entirety. The Court is grateful for her thorough, diligent and thoughtful preparation of the memorandum accompanying the reference for a special review. It is to be hoped that the trial magistrate concerned will have taken these comments to heart. Normally it would

follow as a matter of course that grave irregularities such as those recorded above would cause the proceedings to be set aside as not having been in accordance with justice. The question that must be considered, however, is whether setting aside the conviction in these two matters would be in the interests of justice. Should the accused be prosecuted again after invalidation of the proceedings on review, they would suffer significant prejudice and discomfort by being forced to attend court, probably having their case postponed at least once, and receiving a sentence that would - and should - differ little from the fine they had imposed upon them now.

9. It is clear that the accused intended to plead guilty to what all parties concerned clearly regarded as a minor offence. The irregularities that occurred did not muddy the quality of justice the accused received when they were convicted. The sentences must be corrected, but it is unnecessary to stand upon meticulous observance of the prescripts of the CPA if the correct result was achieved even though significant procedural errors occurred. The trial itself was not rendered unfair by the lackadaisical fashion in which the trial was conducted.
10. The following order is made in both matters:
 1. The conviction is confirmed.
 2. The sentence is set aside and substituted with following:

‘A fine of R1 000, 00 or, in the alternative, imprisonment for a period of two months. The sentence is suspended in its entirety for a period of eighteen months on condition that the accused is not convicted of the possession or use of or dealing in any drug or dependence producing substance committed during the period of suspension.
 3. The sentence is backdated to 30 September 2014.

Signed at Pretoria on this eighteenth day of December 2014.

E BERTELSMANN

Judge of the High Court

I agree.

K.M. KUBUSHI

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