

SOUTH AFRICA / JUDGMENT

S v Vilakazi (A884/15) [2015] ZAGPPHC 986; 2016 (2) SACR 432 (GP) (7 December 2015) [2015] ZAGPPHC 986

COURT

North Gauteng High Court, Pretoria

BEFORE

N Ranchod, P M Mabuse

CASE / FILE NUMBER

A884/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

7 December 2015

MAGISTRATE

EVANDER

Case

No: 417/15

Magistrate's

serial no: 17/2015

High

Court Ref No: 401/15

THE

STATE VS MOSES KHALATHI VILAKAZI

REVIEW

JUDGMENT

RANCHOD J:

- [1] This matter lay before me as a special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] The accused was arrested on the strength of a J50 warrant in terms of s43 of the CPA on a charge of possession of drugs in terms of the Drugs and Drug Trafficking Act 140 of 1992 (the Act), viz., 25 units of cocaine, which is listed in Part 2 of Schedule 2 to the Act as a dangerous dependence- producing substance and four units of diacetylmorphine (heroin) - listed in Part 3 of Schedule 2 as an undesirable dependence-producing substance.
- [3] He was brought before the magistrate's court on 19 March 2015 where he was legally assisted by a Ms De Klerk on instructions from the Legal Aid Board.
- [4] The charge preferred against the accused was in terms of s4(b) read with sections 1, 13, 17 to 19, 22 to 25 and section 64 of the Act - possession of drugs. Section 4 (read with s13(d)) of the Act prohibits the use or possession of:
- (a) any dependence producing substance; or
 - (b) any dangerous dependence producing substance or any undesirable dependence producing substance.

The section goes on to list the circumstances in which possession or use of the specified drugs are permitted.

Section 13(d) provides that any person who contravenes a provision of section 4(b) shall be guilty of an offence.

The penalty clause is contained in s17 of the Act, and the relevant part is:

'Any person who is convicted of an offence under this Act shall be liable-

- (d) in the case of an offence referred to in section 13(b) or (d), 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; . . . '

- [5] The accused pleaded guilty to the offence and his legal representative handed in a prepared statement in terms of s112(2) of

the CPA. It is clear from the statement that he pleaded guilty to one count of being in possession of both types of dependence producing substances simultaneously, namely, dangerous (cocaine) and undesirable (heroin).

- [6] The learned magistrate accepted the plea of guilty and sentenced the accused as follows:

'Count one: cocaine: Fined with R4000.00 or 15 months imprisonment. A further R2000.00 or 18 months imprisonment wholly suspended for five years on condition that accused is not convicted of possession or use of drugs or dealing in drugs, committed during period of suspension.

Count one: heroin: fined R2000.00 or 18 months imprisonment. A further R1000.00 or nine months imprisonment wholly suspended for five years on condition that accused is not convicted of possession, use or dealing in drugs, committed during period of suspension.'(Quoted as is.)

The accused paid the total amount of the fine of R6000.00.

[7] Acting senior magistrate Ms Du Preez, who perused this matter for judicial quality control purposes concluded that the presiding

magistrate had committed an irregularity. She is of the view that there are two aspects of the sentence imposed which should be

reviewed. Firstly, instead of imposing only one sentence for the possession of the drugs, the magistrate sentenced the accused for the possession of the two drugs separately which constitutes an irregularity. Secondly, when imposing the suspended part of the sentence the magistrate also added a condition that the accused should not be convicted of dealing in drugs during the period of suspension of the sentence. I am grateful to Ms Du Preez for her comments and to Mr Sibara and Mr Van Jaarsveld - state advocate and deputy director of public prosecutions respectively for their helpful memorandum. It is pointed out in Hiemstra: Criminal Procedure under the discussion of section 297 of the CPA that courts should guard against the possibility that a heavy suspended sentence for dealing in drugs can be put into operation by a later minor contravention. In *S v Ntele* 1986 (2) SA 405 (NKA) at 4088-G the court expressed the view that whilst it is permissible to combine possession with dealing when suspending a part of the sentence the condition should be qualified in such a way that the suspended sentence could only be put into effect where the accused was sentenced to unsuspended imprisonment of more than six months in respect of the subsequent conviction. I respectfully agree with that view.

[8] In this matter before me the accused was found guilty of the mere possession of the illegal drugs and not dealing in the substance

(which is a contravention of section 5) for which direct imprisonment under s17(e) is mandatory. If it was a conviction for dealing in a substance and the condition includes possession it would in my view be fair as the penalty provisions for possession are less than that for dealing in drugs.

[9] In view of the irregularity referred to earlier and what I have said above the sentence should be set aside and replaced with an appropriate one. The conviction is in order.

I accordingly propose the following order:

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

The accused is sentenced to a fine of R4000.00 or 36 months imprisonment of which R1000.00 or 12 months imprisonment is wholly suspended for five years on condition that the accused is not convicted of possession or use of drugs or dealing in drugs committed during the period of suspension. The suspended sentence is to be put into effect only if the accused was sentenced to unsuspended imprisonment subsequent conviction of more than six months in respect of the

3. The amount of R3000.00 paid by the accused in excess of the amount referred to in 2 herein shall be refunded to him.

N RANCHOD

JUDGE OF THE HIGH COURT

I agree

P M MABUSE

JUDGE OF HE HIGH COURT

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