IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 575/08
Review No. : 721/08
Review No. : 761/08

In the review between:-

THE STATE

versus

DINEO ANNAH VAN WYK	First Accused
MORAKE MOSHOESHOE	Second Accused
THABISO MOTSHOANAKABA	Third Accused

CORAM: RAMPAI, J *et* C.J. MUSI, J

JUDGMENT BY: RAMPAI, J *et* C.J. MUSI, J

DELIVERED ON: 12 FEBRUARY 2009

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[1] These three cases came to us on automatic review. The accused were separately arrested and charged. They appeared before the magistrate Ladybrand where they were convicted on their respective pleas of guilty. As the case numbers indicate, these were different and unrelated cases in the court below.

[2] Since the cases came from the same district court, where the accused faced the same charges, where they were tried by the same judicial officer and since the same issue arises in all of the matters, we decided, for the sake of expediency, to consolidate them in order to write one instead of three separate judgments.

[3] A prohibited substance, namely cannabis, was found in their respective possessions. Each of them was charged for dealing in cannabis in contravention of section 5(b), Act No. 140 of 1992, alternatively possession of cannabis in contravention of section 4(b), Act No. 140 of 1992. Each of them pleaded guilty to both the main as well as the alternative charges.

[4] The magistrate then applied section 112(1)(b) of the Criminal Procedure Act, No. 51 of 1977(the Act). The questioning elicited the following answers, among others, from the accused – Ms D.A. van Wyk:

> "I made an arrangement with a certain **Lesotho** national at our place of residence to bring me some dagga so that I could **sell** it and earn money ..."

She also admitted that 10,3 kg of cannabis was found in her possession at Maseru Bridge in the Ladybrand district on 1 July 2008.

[5] In response to the magistrate's questions in terms of section 112(1)(b) of the Act, the accused, Mr. M. Moshoeshoe, answered:

> "The dagga was mine. My intention was to **exchange** the dagga for maize so that I can take it to **Lesotho**."

He also admitted, among others, that the mass of the cannabis he was carrying from Lesotho while on a rural road to Frikkies Farm in the Ladybrand district on 16 August 2008 was 1,34 kg.

[6] In response to the magistrate's questions in terms of section 112(1)(b) of the Act, the accused, Mr. T. Motshoenakaba, admitted to importing cannabis and answered that:

> "I was **from Lesotho** to Bekkersdal with that bag containing dagga: I was going to use that dagga for medicinal purposes."

He also admitted that he carried 16,8 kg of cannabis at the time of his arrest at Maseru Bridge, district Ladybrand on 11 September 2008.

[7] Notwithstanding the aforegoing explanations, through which each of the accused admitted that he/she imported cannabis from a neighbouring country into this country either for personal use or for the purpose of selling it, which is an illegal transaction prohibited by section 5(b) read with section 1 of Act No. 140/1992, none of them was convicted of dealing in cannabis. Instead, all of them were found guilty of illegal possession in contravention of section 4(b), Act No. 140/1992.

[8] Having perused and considered the three records as amplified by the three explanatory statements received from the magistrate, it is our considered opinion that in all of these three cases the convictions were certainly not in accordance with justice.

[9] The illegal dealing in cannabis attracts a stiff mandatory sentence for an offender. The relevant legislation prescribes no mandatory sentence for the illegal possession of cannabis. This drastic distinction underlines the fact that dealing in a prohibited dependence producing substance such as cannabis, is a serious social evil in our society. Where the evidence is crystally clear that the accused imported it for personal consumptive purposes or for commercial purposes, she or he must be convicted of the main charge. The admissions they made showed that they had contravened section 5(b) by importing and/or possessing the cannabis in order to sell it.

[10] The court has no discretion, whatsoever, to by-pass the serious implications of a section 5(b) contravention by willy-nilly opting

to convict an offender on the less serious alternative charge. In these instant cases, the magistrate conceded that she misdirected herself by disregarding three pertinent pleas of guilty on the main charges by convicting on the alternative charges for no sound reason other than her personal preference. It is impermissible to do so. Circumventing the prescripts of the Act and sentencing rules in this manner can lead to arbitrary practices with all their adverse impact on the administration of justice.

[11] Once the court is satisfied that all the elements of the main charge have been admitted and that the accused is in fact guilty of the main charge, it is bound to convict on the main charge. See section 112(1)(b) of the Act. The question which arises in these cases is: In what way should we intervene on review?

[12] The powers of the review court are fully outlined in section 304(2)(c) Criminal Procedure Act No. 51 of 1977. Of particular relevance to these cases are the provisions of sub-sections

2(c)(i) and sub-sections 2(c)(iv). Section 304(2)(c) as a whole reads:

> "Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 –
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> (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
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> (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
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> (iii) set aside or correct the proceedings of the magistrate's court;
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> (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
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> (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial division may think fit; and
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> (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or

> the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice."

[13] The authors, Du Toit *et al*: **Commentary on the Criminal Procedure Act**, p. 30-15 comment as follows on the aforesaid section:

> "In terms of s 304(2)(*c*) a review court has unusually wide powers. Apart from the explicit powers of confirmation, amendment or setting aside of the sentences, orders and convictions of magistrate's courts and many others, s 304(2)(*c*)(iv) grants seemingly unlimited powers to the review court. According to this particular provision the court of review may, when the proceedings were not in accordance with justice, deliver the judgment or order or impose the sentence which the magistrate's court should have delivered or imposed (*S v Addabba; S v Ngeme; S v Van Wyk* 1992 (2) SACR 325 (T) 330*g – h*."

[14] Our primary function as a court of review is to exercise control over the lower courts. The proceedings in the lower courts are

reviewed in order to ascertain whether their outcomes were arrived at in accordance with the dictates of justice. On review we are called upon to determine whether the end results, in other words, the verdict and the sanction were in keeping with the substantive and procedural dimensions of the case at hand. If we find otherwise, then we have to correct the error one way or the other.

[15] In **S v MOKOENA** 1984 (1) SA 267 (O) at 269E – F Kotze J observed:

> "Dit is duidelik dat hierdie Hof die bevoegdheid op hersiening het om 'n laer hof se bevinding tot 'n meer ernstige misdaad te verander kragtens art 304 (2) (*c*) (iv) van die Strafproseswet. Hierdie bevoegdheid kan uitgeoefen word nie alleenlik wanneer 'n skuldigbevinding op 'n alternatiewe klag na 'n skuldigbevinding op die hoofklag verander word nie (vgl *R v V* 1953 (3) SA 314 (A)) maar selfs ook waar 'n skuldigbevinding op 'n mindere, bevoegde, misdaad na 'n skuldigbevinding aan die meer ernstige misdaad verander word. Sien *S v E* 1979 (3) SA 973 (A)."

By virtue of our very wide powers of review, we may intervene in these cases by substituting a wrong conviction in each case with a correct conviction on a more serious crime – **S v VILJOEN** 1989 (3) SA 965 (T) at 975D – G.

[16] Where an accused was erroneously convicted on a less serious offence then that which he should have been convicted of, the court has the power, on written notice to the accused, to alter the conviction accordingly – **S v E** 1979 (3) SA 973 (AD). We hasten to point out that **S v E,** *supra,* was before the court on appeal and not on review.

[17] It follows without saying that altering a conviction from a less to a more serious offence ordinarily entails revisiting the sentence and a possible substitution thereof with a heavier sentence than the one already imposed. Seeing that such alteration holds potential prejudice for an accused, considerations of justice and fairness often require that the accused concerned be notified of the danger inherent in the process of altering his conviction. The accused should, in appropriate cases, be offered an

opportunity of arguing against the contemplated alteration of the conviction and its attended consequences. See **S v MZIZI AND ANOTHER** 1990 (1) SACR 503 (N) at 508g – i where Alexander J, with whom Didcott J concurred, said that where there was little to choose between offences which equally deserve the same censure there was no need to invite the offender's view before an irregular conviction could be altered on review. We agree. This, however, is not such a case.

[18] In **S v E**, *supra*, the offender was, on appeal, called upon to adduce argument why the conviction on indecent assault should not be altered to one of rape and why, if the conviction on indecent assault was not altered, the sentence should not be sharpened. According to Hiemstra: **Suid-Afrikaanse Strafproses**, 3rd Edition, p. 703 where a higher court itself considers to alter a conviction to a more serious one, a written prior notice to that effect must be given to the appellant. In principle, we can see no valid reason why such a fair and just practice should not apply in appropriate cases, to alterations of convictions on review. The facts of the particular review will

determine which course the reviewing judge takes. The judge will be guided by factors such as the nature of the offence of which the accused was convicted; the nature of the offence which substitutes it; whether the "new" conviction is subject to mandatory sentences and whether the "new" offence deserves a stiffer sentence. Where, for example, the magistrate after convicting on a lesser common law offence exhausts his/her penal jurisdiction and the conviction is altered, on review, to a more serious common law offence which would also attract the same sentence, it would be unnecessary to solicit the accused's views before the conviction could be altered on review.

[19] Section 304(2)(c)(iv) empowers us to set aside an irregular conviction and to give such judgment as the magistrate ought to have given on the evidence. However, in these matters, we cannot do so in the absence of the three offenders concerned. To do so might infringe their fundamental right to a fair trial. Moreover, the alteration of their verdicts will necessarily convert their criminal status from illegal possessors to illegal dealers.

There is a vast difference between the turpitude of the two types of offenders – **S v MZIZI**, *supra*, at 508h. Even where all things are equal, an illegal dealer and an illegal possessor do not equally deserve the same censure. For these two reasons we would rather refrain from altering the verdicts here and now on review.

[20] Accordingly, we are bound to set the verdicts and the sentences aside. The magistrate court will have to recall the offenders and afford them an opportunity of advancing reasons why the magistrate should not act along the lines set out in this judgment. After hearing each of them and the prosecutor, the magistrate must then consider the appropriate verdict or procedural step. The pleas and questioning of the respective accused were in order. There is no reason to quash it. Likewise there is no need to order that these matters be dealt with by a magistrate other than the one that dealt with these matters.

[21] Once the aspect of the conviction has been disposed of the magistrate will have to consider sentencing afresh. The

accused were sentenced to fines with alternative prison sentences. These sentences would be incompetent if the convictions are altered to dealing in cannabis. See **S v MOSOLOTSANE** 1993 (1) SASV 502 (O) at 503 e – h. The magistrate must take into consideration any period served in prison by the accused, as a result of this case.

[22] Accordingly the following order is made in respect of each case:

22.1 The conviction and sentence are set aside.

22.2 The case is remitted to the magistrate Ladybrand, to deal therewith as set out in this judgment.

22.3 The pleas of guilty and the admissions made during the section 112(1)(b) questioning shall stand.

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M.H. RAMPAI, J

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C.J. MUSI, J

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