

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION: GRAHAMSTOWN)**

SUPREME COURT REF. NO. 20190157

MAGISTRATE'S SERIAL NO. 53/2019

CASE NO: A6345/2018

In the matter between:

**THE STATE**

And

**THEMBELANI DIBA**

**ACCUSED**

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**SPECIAL REVIEW JUDGMENT**

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**DAWOOD, J:**

[1] The accused herein was convicted of contravention of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 – Dealing in Drugs.

[2] The Magistrate sentenced the accused as follows:

*“To pay a fine of (R4000) Four Thousand Rand or in default of payment to undergo (06) six months imprisonment, wholly suspended for five years on condition that the accused is not convicted of contravening section 5(b) Act 140/1992 committed during the period of suspension. ITO 25 Act 140/1992 drugs are forfeited to the State. In terms of section 103(1) Act 60/2000 is declared unfit to possess a firearm.”*

[3] The matter was referred to special review on the basis that the sentence imposed was an incompetent sentence.

[4] No specifics were provided as to why the sentence was considered incompetent.

[5] The presiding Magistrate was appointed to the rank of Magistrate on 1 February 2018.

[6] His sentence was accordingly subject to automatic review if one has regard to the provisions of section 302(1)(a) of the Criminal Procedure Act 51 of 1977.

[7] In *S v Mazibuko*<sup>1</sup> Gorven J held *inter alia* as follows:

“[5] Section 302(1)(a) of the Act reads as follows:

‘(1)(a) Any sentence imposed by a magistrate’s court—

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has **not held the substantive rank of magistrate or higher for a period of seven years**, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),  
**shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.**’

*The amount determined by the Minister is currently R6 000 in the case of a judicial officer who has not held the rank of magistrate for a period of seven years, and R12 000 in the case of a judicial officer who has held the rank of magistrate for a period of seven years or longer.*

[6] And s[ection] 276(2)(a) of the Act is to the following effect:

‘Save as is otherwise expressly provided by this Act, no provision thereof shall be construed—

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<sup>1</sup> *S v Mazibuko* (R 432/2018, 18/18, B504/18) [2018] ZAKZPHC 58; 2019 (1) SACR 239 (KZP) (29 October 2018).

(a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence....’

. . .

[7] In the present matter, the learned magistrate was appointed to the rank of magistrate on 1 November 2015. He had thus not held the rank of magistrate for a period of seven years or longer at the time of sentencing. If the finding in *S v Brits* is to be applied the learned magistrate exceeded his sentencing jurisdiction. That would require the sentence to be reviewed and set aside because it exceeded both R6 000 and three months’ imprisonment.

[8] In *S v Brits*, the learned judges clearly misread the provisions of s[ection] 302(1)(a) of the Act. **Section 302(1)(a)** simply provides when an automatic review is triggered. It **has nothing to do with the sentencing jurisdiction of magistrates**. The finding that: ‘(t)he magistrate’s jurisdiction in respect of s[ection] 302 of the Act is limited to three (3) months imprisonment’ is clearly wrong. It should not be followed or applied.

[9] An automatic review under s[ection] 302(1)(a) of the Act is clearly triggered in the present matter. Having reviewed the conviction of the accused and the sentence imposed by the learned magistrate, I am satisfied that the proceedings appear to be in accordance with justice. They are therefore so certified in terms of s[ection] 304(1) of the Act.”

[8] I am in agreement with the dicta in *Mazibuko’s* case. It is accordingly evident from the foregoing that the provisions of section 302(1)(a) of the Criminal Procedure Act do not limit the learned Magistrate’s sentencing jurisdiction to three (3) months imprisonment, or the imposition of a fine of more than R6000, but rather requires that the matter be sent on automatic review for certification by a Judge to be in accordance with justice, where he has been a Magistrate for less than 7 years.

[9] The Magistrate appears to have erroneously believed that section 302(1)(a) limits his sentencing jurisdiction and the sentence he imposed was accordingly incompetent in the circumstances.

[10] Section 302(1)(a) simply puts checks and balances in place that require all sentences that exceed the sentences specified therein to be subject to review, whether the accused is represented or unrepresented.

[11] The inquiry accordingly is whether or not the sentence imposed is in accordance with justice, not whether or not it is competent.

[12] Section 276(2)(a) is not applicable in this instance as correctly decided in *Mazibuko's case supra*. In this case the weight of the dagga was only 52 grams and the street value was R90-00 according to the testimony of the investigating officer.

[13] A fine of R4000 or six (6) months imprisonment, even wholly suspended for a period of 5 (five) years and declaring him to be unfit to possess a firearm in these circumstances is excessive having regard to the value of the dagga. The sentences imposed induces a sense of shock that warrants interference. The sentence is accordingly found not to be in accordance with justice.

[14] In the circumstances the sentence imposed is set aside and substituted with a sentence of a fine of R1000 or in default to undergo one (1) month imprisonment wholly suspended for one (1) year on condition that the accused is not convicted of contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, committed during the period of suspension and the drugs are declared forfeited to the State.

[14] The following order is accordingly made:

a) The sentence imposed by the Magistrate:

*"To pay a fine of (R4000) or in default of payment to undergo (06) six months imprisonment, wholly suspended for five years on condition that the accused is not convicted of contravening section 5(b) Act 140/1992 committed during the period of suspension. ITO 25 ACT 140/1992 drugs are forfeited to the state. In terms of section 103 (1) Act 60/2000 is declared unfit to possess a firearm"* be and is hereby set aside and substituted with the following sentence:

b) *"The accused is sentenced to pay a fine of R1000-00 (One Thousand Rand) or in default of payment to undergo one (1) month imprisonment, wholly suspended for one (1) year on condition that the accused is not convicted of contravening section 5(b) of Act 140 of 1992, committed*

*during the period of suspension and the drugs are declared forfeited to the state.”*

c) The sentence is ante-dated to 18 July 2019.

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**F. B. A DAWOOD**  
**JUDGE OF THE HIGH COURT**

I AGREE:

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**M. J. LOWE**  
**JUDGE OF THE HIGH COURT**