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

Case No.: 729/2007

In the case between:

**THE STATE**

and

**NATHAN PETERS**

---

**CORAM:** C. J. MUSI, J *et* MOCUMIE, AJ

---

**JUDGEMENT:** MOCUMIE, AJ

---

**DELIVERED ON:** 30 NOVEMBER 2007

---

[1] This matter came before my brother **H. M. Musi, J** on automatic review, in terms of section 302 read with 304 of the Criminal Procedure Act 51 of 1977 ("the CPA"), from the Magistrate Court, Bloemfontein. The accused was convicted of contravention of section 4(b) of Act 140 of 1992 the Drug Trafficking Act ("the Act"); possession 180 grams of dagga. He was sentenced to R1 500,00 (one thousand five hundred rand) or 3 (three) months imprisonment and a further 4 (four)

months imprisonment which 4 months imprisonment was suspended for 4 years on certain conditions.

[2] **H. M. Musi J** couched a query regarding the appropriateness of the sentence in the following words:

> "I note that the sentence imposed is the type that is normally imposed for dealing in dagga. Is there special consideration for the addition of the wholly suspended term of imprisonment over and above the option of a fine?"

The Magistrate supplied her comments. She is of the view that: *"the wholly suspended term of imprisonment over and above the option of a fine would have the effect of deterring the accused from committing similar offences and also prevent the accused from continuing the way of life he is presently leading."*

[3] The accused pleaded guilty to possession of dagga and was correctly convicted. The issue is whether the Magistrate exercised her discretion judiciously when she sentenced the

accused to the aforementioned sentence. It is trite that sentencing is a function that lies within the discretion of the trial court. See **R v Maphumulo and Others,** 1920 AD 56; **S v Rabie** 1975 (4) SA 855 (A) and **S v Barnard** 2004 (1) SACR 191 (SCA).

[4] The accused is a 18 year old first offender. He is not attending school. He resides with his parents. It is not clear from the Magistrate's reasons for sentence what persuaded her to consider this type of sentence as the only appropriate option in these circumstances. It is clear from the record, including the Magistrate's reasons that the Magistrate did not consider other sentencing options.

[5] The court dealing with a case involving young children whose moral culpability cannot be compared to that of an adult should approach punishment as far as possible from the point of view of the potential for rehabilitation and care. In **S v Nkosi** 2000 (1) SACR 135 (W) guidelines were laid down for

the sentencing of juvenile offenders for both serious and less serious offences. See also **S v Z en Vier Andere Sake** 1999 (1) SACR 427 (E) at 430 f.

[6] In **S v Phulwane & Others** 2003 (1) SACR 631 (T) at 634 h to 635 a **Bosielo J** states:

> "*When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officer invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community."*

[7] The Magistrate's reasoning as alluded to above is unpersuasive. Suspended direct imprisonment remains direct imprisonment. It is very prejudicial to an accused person especially a young first offender to be sent to direct imprisonment for an offence such as possession of dagga. Although the dagga in this matter is more than the "normal" one stick or one cigarette, a sentence of direct imprisonment is still inappropriate. The accused is exposed to a possible sentence of 4 months imprisonment should he be in future convicted of a very small amount of dagga.

[8] Although the Magistrate states that the sentence will prevent the accused from continuing the life he is presently leading, it is not clear what she means by this. There's nothing on record in relation to the accused's way of life except that he is unemployed and depends on his mother's support.

[9] In my view it would serve no rational purpose to remit the matter to the Magistrate to impose an alternative sentence. In

my view we are in as good a position as the Magistrate was to impose the appropriate sentence.

[8] In my view, the Magistrate misdirected herself in concluding that the sentence aforementioned was the only suitable sentence to impose on an 18 year old first offender in these circumstances.

[9] In the circumstances I make the following order:

**1. The conviction of contravention of section 4(b) Act 140 of 1992, possession of dagga, is confirmed.**

**2. The sentence of R1 500,00 or 3 months imprisonment and a further 4 months imprisonment suspended for 4 years on certain conditions is set aside and replaced by the following.**

**3. *"R1500,00 (one thousand and five hundred rand) or 3 (three) months imprisonment wholly suspended for 3 years on condition that the accused is not convicted of contravention of section 4(b) Act 140 of 1992 committed during the period of suspension.***

_____

**B. C. MOCUMIE, AJ**

I concur.

_____

**C. J. MUSI, J**

/em