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

Review No. : 513/2008

In the review between:-

THE STATE

versus

VALENTINA MAPHATSOE

CORAM: MOCUMIE, J *et* MOLOI, AJ

DELIVERED ON: 4 DECEMBER 2008

MOCUMIE, J

[1] The matter came before me on automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, 51 of 1977, ("the CPA"). The accused, together with two other persons, appeared in the Ladybrand Magistrate's Court on 21 April 2008 on a charge of contravention of section 5(b) of the Drug Trafficking Act, 140 of 1992, ("the Drug Trafficking Act"). On the same day (21 April 2008) accused who was No. 3 on the charge sheet then pleaded guilty to dealing in 16,6 kilogram of dagga and was convicted accordingly. She was sentenced to R6 000,00 (six thousand rand) or 12

(twelve) months imprisonment. In addition she was sentenced to 10 (ten) months imprisonment which was suspended for 5 years on certain conditions.

[2] I was of the view that the sentence was too harsh and sent a query to that effect. The presiding officer supplied her comments. *Inter alia* she submitted that the term of imprisonment and the alternative fine are proportionate to each other based on her calculation of R500,00 x 12 = R6 000,00 which means that the accused would pay R500,00 each month.

[3] The accused pleaded guilty to dealing in dagga and was correctly convicted. The issue is whether the presiding officer exercised her discretion judiciously when he 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] A Court of Appeal or review is not entitled to interfere with the imposed sentence unless it is convinced that the sentencing discretion has been exercised improperly or unreasonably. See **S v Pillay** 1977 (4) SA 531 (A) at 534H – 535G. Amongst other varying factors differing from one case to another, it may be a misdirection for a presiding officer to overemphasize the seriousness of the offence or the interests of society and underemphasize the personal circumstances of the offender. That type of misdirection would warrant the Court of Appeal or review to interfere with the sentence imposed.

[5] The accused's personal circumstances are set out by the presiding officer in his judgment. The accused is a 40 year old first offender. She was arrested with two other people on 11 April 2008. They appeared on 14 April 2008 when the matter was postponed to 21 April 2008 whilst they remained in custody. When they appeared 10 days later the accused immediately took responsibility for her wrongful deed and pleaded guilty.

[6] She is not employed. She is a widow with six children. The youngest child is 13 years old. Her husband passed on in 2004. She put all the circumstances which led her to commit this offence before the court.

[7] It is clear from the record, including the presiding officer's reasons for sentence, that considerable weight was placed on the interests of the society in total disregard of all other important factors including the factors enumerated in paragraphs 5 and 6 above.

[8] It is understandable for a presiding officer who deals with cases of this nature on a daily basis, to impose sentences that will send a message to potential offenders and the society that courts will not tolerate the commission of this type of offence. It must however be remembered that although prevalence of a crime should be taken as a materially aggravating factor, that should be done only in conjunction with other aggravating factors. This factor must not be overemphasised. See **S v Seoela** 1996 (2) SA 616 (O). Exemplary sentences are basically unjust. Each

individual accused that appears before a court must be treated according to his or her own personal circumstances.

[9] In the circumstances of this case I am of the view that there is an imbalance between the fine imposed and the alternative imprisonment which would on its own have the result that the imposed sentence cannot stand. In **State v Motsamai** unreported Review Case 242/2008 this Court stated the following:

> "It is trite that the balance between the fine imposed and alternative imprisonment should be reasonable in view of all the circumstances of the particular case. This balance cannot and should never be determined on the basis of a mathematical calculation. In this regard the following was stated in **S v Kapeng** 1992 (1) SASV 596 (O) at 599 F – 600 B:
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> "Daar is al by herhaling beslis dat die verhouding tussen die boete en die gevangenisstraf wat in die alternatief daartoe opgelê moet word redelik moet wees en afhanklik is van al die omstandighede van die betrokke beskuldigde en die misdaad wat gepleeg is. Reeds solank terug soos 1924 het Regter Feetham in *R v Frans* 1924 TPD 419 op 419 soos volg verklaar:

'Where a fine is imposed as an alternative to imprisonment it should, I think, bear some relation to the probable resources and earnings of the person on whom it is imposed and to the number of months' imprisonment which are considered sufficient as an alternative punishment.'

Dit is by herhaling beklemtoon dat straf soveel moontlik geïndividualiseer moet word (vgl *S v V* 1972 (3) SA 611 (A)). …….Dit is egter duidelik dat die verhouding tussen 'n boete en 'n periode van gevangenisstraf nooit op 'n wiskundige wyse bereken of toegepas behoort te word nie."

(My underlining)

[10] Over and above I am also of the view that the term of imprisonment in this instance is also too long considering all the facts and circumstances as the suspended term of imprisonment that was imposed in addition should also be taken into consideration.

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

1. **The conviction of contravention of section 5(b) of the Drug Trafficking Act, 140 of 1992, is confirmed.**

2. The sentence imposed by the magistrate on 21 April 2008 is set aside and substituted with the following:

"R3 000,00 (three thousand rand) or 6 (six) months imprisonment. In addition 6 (six) months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of contravention of section 5(b) of Act 140 of 1992 committed during the period of suspension."

3. The sentence must be deemed to have been imposed on 21 April 2008.

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B.C. MOCUMIE, J

I concur.

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K.J. MOLOI, AJ

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