CASE NO.: CR 03/2012

IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI

In the matter between:

THE STATE

and

MARIA WILIBARD

(HIGH COURT REVIEW CASE NO.: 296/2011)

CORAM: LIEBENBERG, J *et* TOMMASI J

Delivered on: 20/01/2012

REVIEW JUDGMENT

TOMMASI, J.: [1] The accused, a 14 year old female was charged with and convicted of having contravened section 2(b) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 (RSA) having been found in possession of

1gram of seeds of Cannabis (dagga) valued at N$3.00. The accused, having pleaded guilty, was convicted in terms of section 112(1)(a) of the Criminal Procedure Act, 51 of 1977 and sentenced to one year imprisonment to be served at Elizabeth Nepembe Centre.

[2] I am of the opinion that the conviction and sentence imposed is clearly not in accordance with justice and that the accused who is a juvenile may suffer irreparable harm if the matter is not dealt with forthwith. It is for these reasons that no statement was obtained from the presiding magistrate.

[3] The magistrate, at the behest of the State Prosecutor, convicted the accused on her mere plea of guilty. A pre-sentencing report was submitted into evidence for the purpose of sentence. The recommendations of the probation officer was that; the accused be released into the care of her father; that the accused receive a suspended sentence; she be ordered to return to school and that she attends a Life Skills Programme at the Ministry of Youth under the supervision of the probation officer at the Ministry of Gender Equality and Child Welfare. The State objected to the recommendations of the probation officer and proposed that the accused be sent to a rehabilitation centre because the accused "*is not able to be controlled by the parents*". The father, who was also in attendance in his capacity as the guardian of the accused, was

called to testify. He testified that he has no objection to the accused being sent to the rehabilitation centre as she was "*misbehaving*". The accused, although the guardian was present, was unrepresented. She informed the magistrate that she is a changed person and that she stopped going to school to avoid the bad influence of her friends. The accused, at the time of sentencing, had already spent three months in custody without being released into the care of her father. The magistrate in her reasons for sentence recorded that she had considered the personal circumstances of the accused, the pre-sentence report and the recommendations by the State prosecutor and was of the opinion that a one year imprisonment at the Elizabeth Nepembe Rehabilation Center was appropriate.

[4] Section 112(1)(a) provides that:

> *"Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-*
>
> (a) *the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$6 000, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only"*

The magistrate thus could not impose a sentence of imprisonment or any other form of detention in terms of a conviction under s 112(1)(a)[1].

This includes the detention at a rehabilitation centre.[2]

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[1] S v ALUDHILU 2007 (1) NR 70 (HC)

[5] The sentence imposed herein, given the youthfulness of the accused who was a first offender and the negligible quantity of cannabis, is shockingly inappropriate. The magistrate, without calling the probation officer to testify was persuaded only by the objection of the prosecutor to reject the recommendations of the probation officer. The probation officer spent considerable time and effort to compile the report and the appropriate action would have been to call her as a witness in order to respond to the objections by the State to her recommendations. It cannot be said under these circumstances that the judicial officer gave proper consideration to the pre-sentencing report.

[6] The accused in this matter is described in the report as a troubled teenager who due to peer pressure was experimenting with petty crimes. It is trite law the courts should be: "*particularly careful when designing sentences, for youthful offenders given the formative effect it may have on the development of their personalities ...*" *[S v BEGLEY 2000 NR 112 (HC) at page 114 I-J].* Custodial sentence, albeit ordered that it be served at a rehabilitation centre, should be reserved for juveniles who commit serious offences.

[2]See S v TOLMAY 1980 (1) SA 182 (NC) [Head note: Committal to a rehabilitation centre in terms of s 296 of the Criminal Procedure Act 51 of 1977 is a form of detention without the option of a fine as intended in s 112 (1) (a) (i) of the Act. Accordingly, an order of detention in a rehabilitation centre in terms of s 296 cannot be made where an accused is convicted in terms of s 112 (1) (a) (i) only on the basis of his plea of guilty.

[7] A further option which was available to the magistrate was to act in terms of section 254 (1) of the Criminal Procedure Act, 51 of 1977 which provides that:

> *"If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child in need of care as defined in section 1 of the Children's Act, 1960 (Act 33 of 1960), and that it is desirable to deal with him in terms of sections 30 and 31 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in section 4 or 5 of that Act and that he be dealt with under the said sections 30 and 31."*

[8] The prosecutor raised the issue of poor parental control of the accused. This is a clear indication that the accused was a child in need of care as defined by section 1 of the Children's Act, 1960 (Act 33 of 1960).

[9] I am of the view that the conviction and sentence should be set aside without remitting it to the magistrate. The State already had an opportunity to adduce evidence herein and opted not to do so[3]. The accused may and should be brought before the Children's Court for an enquiry in an attempt to find a solution for a child clearly in need of care.

[10] In the premises the following order is made:

1. The conviction and sentence are set aside

[3]S v Sekhulu 1969 (2) SA 143 (T) & S v TOLMAY 1980 (1) SA 182 (NC)

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TOMMASI, J

I agree.

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LIEBENBERG, J