REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: A 404/2012

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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DATE SIGNATURE

In the matter between

WINDVOGEL, JOHANNES **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: WEPENER J and VALLY J

Heard: **7 NOVEMBER 2013**

Delivered: **7 NOVEMBER 2013**

J U D G M E N T

WEPENER J:

[1] This appeal serves before us, with leave of the magistrate, against the sentence imposed on the appellant. However, appellant's legal representative's heads of argument contain arguments regarding the merits of the matter. Prior to the hearing of the matter we were advised that the appellant does not persist with those arguments and that the argument on appeal is to be contained to the argument regarding sentence.

[2] The appellant was convicted on four counts of contravening s 5 (b) of the Drugs and Drug Trafficking Act 140 of 1992. The appellant was sentenced to a period of imprisonment of 8 years imprisonment on each count. The magistrate ordered that the sentence would run concurrently with a sentence of 20 years imprisonment which the appellant was then serving.

[3] Mr Van der Merwe argued that the sentence imposed by the magistrate induced a sense of shock and that there is a startling disparity between the sentence imposed and the sentence which a court of appeal would impose. There has been no argument or indication that the magistrate misdirected herself in any way.

[4] The record is incomplete and does not fully set out SAP 69 form which contains the previous convictions of the appellant. However, the magistrate remarked that the appellant had several previous convictions for dealing in drugs. The prosecutor, when reading out the appellant's previous convictions, placed the following on record and the appellant admitted it.

> 'Aanklaer lees inhoud van SAP 69 in die rekord Die datum 15 Desember 1978, oortreding, opsetlike saakbeskadiging, vensters, saak nommer 514897. Ingevolge Artikel 297(1)(A)(2) op die 29ste Januarie 1979 word die beskuldige gevonnis. Ingevolge Artikel 297(1)(A)(2) Wet 51/1977 word beskuldige se vonnis uitgestel vir 'n tydperk van drie (3) jaar.
>
> Dan, op die 5de Desember 1979 word die beskuldige gevonnis tot drie (3) houe met die ligte rottang, poging tot huisbraak met die opset om te steel.
>
> Op die 19de Desember 1978, vier (4) houe met 'n ligte rottang ingevolge Artikel 294 van Wet 51/1977, huisbraak met die opset om te steel en diefstal.
>
> Op die 19de November 1983, vyf (5) jaar gevangenisstraf, handel in mandrax, ses tablette.

Op die 11de Maart 1991, twaalf (12) maande gevangenisstraf, daarbenewens word beskuldigde gevonnis tot drie (3) jaar gevangenisstraf, opgeskort vir vyf (5) jaar op die volgended voorwaardes: Dat die beskuldigde nie weer skuldig bevinfd word aan ‘n oortreding van Artikel 2(A) of 2(B) van Wet 41/1971 nie, welke oortreding gepleeg is gedurende die tydperk van opskorting en waarvoor hy gevonnis word tot onopgeskorte gevangenisstraf van ten minste twaalf (12) maande gevangenisstraf, al dan nie. Die bepalings van Artikel 2(A) en 2(B) Wet 41/1971 is aan beskuldigde verduidelik. Oortreding, handel dryf in mandrax, een-en-sestig tablette.

Edelagbare, dis twaalf (12) maande gevanenisstraf, daarbenewens word die beskuldigde gevonnis tot drie (3) jaar gevangenisstraf, opgeskort vir vyf (5) jaar.

Dan die 11de Maart 1991, Wet 140/1992 van die Wet op Dwelmmiddels en Dwelmsmokkelary, handel dryf in ‘n gevaarlike afhanklikheidstof of ongewenste afhanklikheidsvormende stof, te wete dagga. Aanklagte saamgeneem vir doeleindes van vonnis, twaalf (12) jaar gevangenisstraf.

11 Maart 1991, misbruik van afhanklikheidsvormende stowwe en rehabilitasie sentrums, besit, gebruik of handel in verbode afhanklikheidsvormende medisyne of plant, Wet op Dwelmmidels en Dwelmsmokkelary, handel dryf in ‘n gevaarlike afhanklikheidsvormende stof of ongewenste afhanklikheidsvormende stof te wete dagga, drie (3) jaar gevangenisstraf, welke gevangenisstraf opgeskort words vir vyf (5) jaar op die volgende voorwaardes: Dat beskuldigde nie weer skuldig bevind word aan ‘n oortreding van Artikel 2(A) of 2(B) van Wet 41/1971 nie, welke oortreding gepleeg is gedurende die tydperk van opskorting en waarvoor hy gevonnis word tot onopgeskorte gevangenisstraf van ten minste twaalf (12) maande gevangenisstraf. Die verbode afhanklikheidvormende medisyne word ingevolge Artikel 8 van Wet 41/1971 aan die Staat verbeurd verklaar.

Weereens die 11de Maart 1991, misbruik van die afhanklikheidsvormende stowwe en rehabilitrasie sentrums, ‘n verdere drie (3) jaar gevangenisstraf, welke opgeskort vir vyf (5) jaar op die volgende voorwaardes: Dat die bskuldigde nie weer skuldig bevind word aan ‘n oortreding van Artikel 2(A) of 2(B) van Wet 41/1971 nie, welke oortredings gepleeg is gedurende die tydperk van opskorting en waarvoor hy gevonnis word tot onopskorte gevangenisstraf van ten minste twaalf (12) maande gevangenisstraf. Die bepalings van Artikel 2(A) en 2(B) Wet 41/1971 is aan beskuldigde verduidelik. Verbode afhanklikheidsvermonde medisyne word ingevolg Artikel 8 van Wet 41/1971 aan die Staat verbeurd verklaar.

Edelagbare, as ek dit reg verstaan, dan word die aanklagte op die datum van 11 Maart 1991 is almal saamgevat dan en ‘n vonnis van twaalf (12) jaar gevangenisstraf opgele, plus dan ‘n verdere drie jaar wat opgeskort is vir ‘n tydperk van vyf jaar.

Edelagbare, dan is daar ‘n verdere vorige veroordeling wat op die 23ste Januarie 2002 te Johannesburg opgele is aan beskuldigde een vir handel in kokaine, ‘n oortreding van Artikel 5(B) van Wet 140/1992, gevonnis twintig (20) jaar gevangenisstraf.’

This, to say the least, is a formidable record.

[5] Mr Van der Merwe referred us to sentences imposed in two cases and argued that, comparatively speaking, the sentence in this matter is out of kilter. See *S v Randall* 1995 (1) SACR 599 (C) and *S v Mc Keevey* 2000 (1) SACR 410 (W).

[6] The State, on the other hand, referred to case law where higher sentences were imposed for convictions of a lesser nature. I am of the view that the sentences imposed in other cases can only be a guideline and that the offence and the circumstances in each case vary. Lewis AJA (as she then was) said in *S v Jimenez* 2003 (1) SACR 507 (SCA) at para 6 as follows:

'[6] Counsel for the appellant argued before us that, on a comparative assessment of other sentences imposed for the commission of similar offences, the sentence was disturbingly inappropriate. Indeed, it is somewhat higher than sentences imposed recently in similar circumstances: see, for example, *S v Hightower* 1992 (1) SACR 420 (W); *S v Randall* 1995 (1) SACR 559 (C); *S v Opperman* 1997 (1) SACR 285 (W); *S v Homareda* 1999 (2) SACR 319 (W); and *S v Mkhize* 2000 (1) SACR 410 (W) where the sentences for trafficking in drugs have ranged from an effective period of five to ten years' imprisonment. Counsel was hard-pressed to argue that there was a shocking disparity between these sentences and the sentence of 12 years imposed on the appellant. Furthermore, while it may be useful to have regard to sentences imposed in other similar cases, each offender is different, and the circumstances of each crime vary. Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.'

[7] The Supreme Court of Appeal made it plain in *S v Fraser* 1987 (2) SA 859 (A) at 863 C – D that 'it is an idle exercise to match the colour of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence'. Ultimately, each case must be decided in the light of its peculiar facts.

[8] Save for his conviction in 1983, during 1991 the appellant received a sentence of 12 years imprisonment for a similar conviction. Taking that sentence into account his clean record for the next 12 years comes as no surprise. Having served the 12 years imprisonment (or a slightly lesser period due to parole), the appellant was then selling drugs again during 2000. It was for these offences, shortly after the appellant had served a portion of the 12 year sentence, that he was eventually sentenced by the magistrate in this matter for dealing in drugs.

[9] I am of the view that the appellant's previous convictions indeed play a meaningful role as he has shown that as soon as he is out of prison he just continues with his unlawful conduct. There are times when the criminal's personal circumstances must play a lesser role than the duty of the courts to assist to stop dealers in drugs from continuing with their trade. See *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 58:

'Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided.'

Also see *S v Jimenez* at 520 para 23 and *S v Mhlakeza and Another* 1997 (1) SACR 515 SCA at 519 e. Olivier JA said *S v Jimenez* at 523d:

'The magistrate took into account a previous conviction of the appellant, 20 years earlier. It had lapsed, but this Court held that it could be taken into account for the limited purpose of showing that the crime had been committed in spite of a previous warning. This does not distinguish Morebudi from the appeal now under consideration, because it is clear that the present appellant knew that he was acting illegally and was aware of the seriousness of the offence in this country.'

[10] The appellant and his associates were running a business of selling drugs on the street corners in the centre of Johannesburg. Their conduct can only be described as criminal and reprehensible.

[11] In *S v Jimenez*, Olivier JA said:

'[17] It is a salutary rule that this Court will not readily differ from a Court *a quo* in its assessment either of the factors to be regarded to or of the value to be attached to them. I also associate myself with what Kriegler J said in *Key v Attorney-General, Cape Provincial Division and Another*1996 (2) SACR 113 (CC) (1996 (4) SA 187; 1996 (6) BCLR 788) at 120 - 1 (SACR) and 195 (SA) in para [13]:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there

> will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

Consequently, I am satisfied that although there was, technically speaking, a misdirection on the part of the Court *a quo*, it did not constitute a material misdirection.

[18] The ultimate question is whether the sentence of 12 years' imprisonment imposed by the Court *a quo* was a fair and reasonable one. (See *S v Peters* 1987 (3) SA 717 (A) at 727F - H; *S v L*1998 (1) SACR 463 (SCA) at 468*f* - *j*.) I think it was.

[19] For a considerable time our courts have viewed dealing in 'hard' drugs, such as heroin and cocaine, in a very serious light. In *S v Gibson* 1974 (4) SA 478 (A) at 481H this Court, *per* Holmes JA, welcomed the effort of the Legislature:

> "to stamp out the growing social evils of the abuse of drugs as a wise and laudable one. No doubt, too, that, for example, a supplier for gain may in general be regarded as a vicious person who needs to be put down, for in the drug traffic he is an indispensable evil link in the chain leading to the consumer."

[20] In *S v Hightower*1992 (1) SACR 420 (W), a case concerned with dealing in cocaine, the Witwatersrand Local Division of the Supreme Court quoted with approval (*per* MacArthur J; Mahomed J concurring) what Schreiner JA had said in *R v Karg* 1961 (1) SA 231 (A) at 236B - C, viz:

> "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

MacArthur J, at 422*j*, continued:

> "The deterrent aspect, however, remains as important as ever. I have already mentioned this aspect briefly and I would add that anyone who wishes to deal in a dangerous dependence-producing drug like cocaine must be made to realise that the courts will not be sympathetic, but will exact a heavy price upon anyone who is found guilty of that offence."

[21] There is ever-increasing smuggling of hard drugs into our country, described fully by Steyn AJ in *S v Randall*1995 (1) SACR 559 (C) at 566*g* - *i*. The learned Judge continued (at 566*i* - 567*a*) with the following remarks, with which I fully associate myself:

> "Drug dealers are unscrupulous criminals. They will use the weak, the gullible, and, may I add, the greedy. They are without conscience. They do not care for those who facilitate their evil objectives, nor do they have a concern about the lives they ruin by trafficking in drugs. Society is at risk should it hesitate to use every legitimate mechanism at its disposal to protect itself against their destructive designs. One of these weapons - and I emphasise that it is only one of them - is to make it clear to courier and principal alike, that the game is not worth the candle and that the price society exacts for transgressions will not be tempered by concern for the plight of the weak and the greedy."

[22] The learned Judge also emphasised (at 567*c* - *d*) that in a multi-pronged strategy combating the importation and distribution of dangerous drugs, 'the courts have their role to play in imposing sentences which speak clearly of society's determination to fight this danger with all the weapons at its disposal'.

[23] It was also laid down by Steyn AJ (at 567*f* - *h*) that the personal circumstances of couriers of hard drugs, mitigating though they may be, are outweighed by the public need for protection through the imposition of deterrent sentences. (See also *S v Sebata*1994 (2) SACR 319 (C) at 322*j et seq*.)

[24] In *Sebata (supra*) Steyn AJ referred with approval (at 323*g et seq*) to the judgment of Lord Lane CJ and Talbot J in *R v Aramah* 1983 Crim LR (CCA) 271 where the learned Judges remarked on the vice of dealing in hard drugs:

> "(F)irst of all, they are easy to handle. Small parcels can be made up into huge numbers of doses. Secondly, the profits are so enormous that they attract the worst type of criminal. Many of such criminals may think, and indeed do think, that it is less dangerous and more profitable to traffic in heroin or morphine than it is to rob a bank. It does not require much imagination to realise the consequential evils of corruption and bribery which the huge profits are likely to produce. (T)his may be a fruitful source of violence and internecine strife. Fourthly, the heroin taker, once addicted (and it takes very little experimentation with the drug to produce addiction), has to obtain supplies of the drug to satisfy the terrible craving. It may take anything up to hundreds of pounds a week to buy enough heroin to satisfy the craving, depending upon the degree of addiction of the person involved. The only way, it is obvious, in which sums of this order can be obtained is by resorting to crime. This in its turn may be trafficking in the drug itself and disseminating accordingly its use still further.
>
> Fifthly, and last, and we have purposely left it for the last, because it is the most horrifying aspect, comes the degradation and suffering and frequently the death which the drug brings to the addict. It is not difficult to understand why in some parts of the world traffickers in heroin in any substantial quantity are sentenced to death and executed.
>
> Consequently anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving these class "A" drugs should be done."

What the learned Judges said of heroin and morphine, applies equally to cocaine (see *S v Sebata (supra* at 325*a* - *b*)).

[25] To the list of evils enumerated above must be added the devastating effect the addiction to hard drugs has on the family, relations, employees and friends of the user. Families fall apart, are bankrupted and drained emotionally by the experience of seeing a family member, usually a youth, becoming addicted and changing from a healthy, lovely child to a human wreck. No wonder that in several countries and cultures, the smuggling of hard drugs is punishable by death. (For details, see D P van der Merwe *Sentencing* at para 12-5.)

[26] The aversion with which trafficking in hard drugs, especially the smuggling thereof into our country, is viewed by the courts, is illustrated by repeated statements to this effect, and by the imposition of long terms of imprisonment, eg *S v Opperman*1997 (1) SACR 285 (W) at 288*i et seq*; *S v Homareda (supra* at 326) and *S v Tshabalala*1999 (1) SACR 412 (C) at 427*a*; *S v Howe* 1989 (2) SA 473 (W) at 478E - G.

[27] In spite of all these statements and despite heavy sentences imposed by the courts the trafficking in drugs and the employment of couriers to smuggle hard drugs

into our country has not abated or diminished. On the contrary, only the most naive would not be aware of the ever-increasing stream of drugs illegally coming into our country via international ports and airports. We are becoming known as a haven for dealers in drugs and our youth, students and schoolchildren are singled out as soft targets. Against this background, the legislature has over the years steadily increased the punishment to be meted out to dealers in drugs, including couriers from foreign countries. In 1971 the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971, was enacted. For illegal dealing in prohibited drugs, the discretion of the courts was taken away: first offenders had to be given a minimum sentence of five years' imprisonment; second and subsequent offenders had to be given a minimum of ten years.

[28] In 1986 the courts were given back their discretion in sentencing. (See the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act 101 of 1986.) In 1990, however, by the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act 78 of 1990, the maximum sentences previously prescribed were raised substantially.

[29] All previous statutory provisions dealing with drug offences were repealed in 1992 by the Drugs and Drug Trafficking Act 140 of 1992. Section 17 prescribes maximum sentences. In the case of dealing in any dangerous dependence-producing substance or any undesirable dependence-producing substance, any court, including a magistrate's court, may impose a sentence of imprisonment for a period not exceeding 25 years, or both such imprisonment and such fine as the court may deem fit to impose (ss 5*(b)*, 17*(e)* and 64).

[30] Finally, s 51 of the Criminal Law Amendment Act 105 of 1997 imposed minimum sentences for certain serious offences, including, *inter alia*, dealing in cocaine. The section provides that a regional court or High Court that has convicted a person of such offence may sentence the person, in the case of

(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender, to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender, to imprisonment for a period not less than 25 years.

The maximum sentences imposed by the 1992 Act remain intact.

[31] In my view, it is proper for a court considering sentence to have regard to the legislative policy as expressed in legislation dealing with sentencing. If this were not so, legal and social confusion would ensue, leading to a conflict between the legislator and the courts. In imposing sentences for drug-related crimes, courts must take cognisance of the persistent policy of the Legislature that these crimes must be viewed in a most serious light and heavy sentences imposed. (See also *S v Howe (supra* at 478E - G); *S v Gibson* 1974 (4) SA 478 (A) at 481H *per* Holmes JA.)

[32] In short, this is not an area where 'maudlin sympathy' (the expression used by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 861C - D) should be allowed to override common sense and social and legislative policy. Nor should Judges be swayed by misplaced pity (*intempestiva misericordia* - an expression used by Van der Linden *Supplement*, quoted by Joubert AJ in *S v Opperman*1997 (1) SACR 285 (W) at 292; see also *S v Zinn* 1969 (2) SA 537 (A) at 541).

[33] The Court *a quo* correctly found that the appellant had shown no remorse. He also did not testify under oath as to the alleged remorse. In *S v Seegers* 1970 (2) SA

506 (A) at 511G - H, Rumpff JA made a remark which has been followed in numerous cases and is part of daily practice in the criminal courts:

> "Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined."

[34] I am also not impressed by the argument that it will be hard for the appellant to be incarcerated for a long period in a foreign country. That will happen because the appellant chose our country for the commission of a vile crime. In *S v Lister* 1993 (2) SACR 228 (A) this Court, *per* Nienaber JA said at 232*g* - *h*:

> "To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence."

[35] Even if one accepts the alleged personal circumstances of the appellant - he chose not to confirm them under oath - they are not out of the ordinary and certainly do not deserve special, more lenient treatment.

[36] This Court must also be sensitive to the message it sends out to the legislator, the public and drug dealers here and overseas. Our country is fast becoming known as a profitable and easily accessible market for drug dealers and drug smugglers. Because of the relatively light sentences our courts impose for these offences, compared to many other countries and because of the particularly lenient parole conditions prevailing here at present, illegal drug trafficking has obviously become a profitable business. The appellant was prepared to take the risk of a confrontation with our criminal justice system in return for a remuneration of US$5 000. The sentences imposed by the courts must make it clear to intended drug couriers that the game is not worth the candle.'

[12] I am also of the view that the fact that appellant was the actual dealer, supplying the drugs to other persons, is an aggravating factor of the matter. See *S v Jimenez* at 523a.

[13] Save for two of the convictions now under consideration, the appellant's convictions relate to offences committed on different dates. He is clearly an unrepentant drug dealer. The members of the South African Police went to great lengths to expose the business which the appellant ran and approached the area where the appellant and his associates sold drugs to members of the public by taking videos of all the transactions which took place and so to expose the appellant and his coperpetrators. The evidence shows that the appellant was indeed the person in charge of this drug dealing business.

[14] The sentence imposed by the magistrate is severe. It was imposed on the basis that the appellant had also received a sentence of twenty years imprisonment at the time when the sentence was imposed. However, the effect of the sentence of twenty years imprisonment was largely neutralised by the order of the learned magistrate that the sentence in this matter was to run concurrently with that sentence. That conviction and sentence, i.e. the sentence of twenty years imprisonment, have in the meantime been set aside on appeal and we should approach the matter on the basis that no such conviction and sentence is to be taken into account.

[15] Having regard to the fact that it seems to be the appellant's way of life to sell drugs to others his conduct, in my view, calls for a sentence which would not only prevent the appellant from continuing with his business of selling drugs but be a warning to others who do so with the disastrous consequences upon members of the general public and the community.

[16] The appellant should not have had the benefit of bail pending the appeal. We do not know why it took 11 years for the appeal to be set down. In my view, had the appellant continued to serve his sentence in 2005, he may well have been on his way to parole. The fact that his incarceration will only commence now, is due to his own actions of applying for bail and not serving his sentence. It could never have been contemplated that the appellant would not be sentenced a lengthy period of incarceration.

[17] In *Kwanape v S* [2013] JOL 30935 (SCA) Petse JA, said:

'[8] It goes without saying that the delays experienced in this matter are entirely unacceptable for obvious reasons. In terms of s 35(3)(o) of the Constitution the appellant has a right to a fair trial which includes the right of appeal to a higher court. Consequently the delays experienced in this case undermined or compromised those rights in circumstances where there can be no justification therefor in an open and democratic society.'

The delay, however, cannot affect the sentence to be imposed on the appellant.

[18] I am of the view that having regard to the seriousness of the offences committed by the appellant, the sentence imposed by the magistrate is unassailable. Heher JA said in *S v Keyser* 2012 (2) SACR 437(SCA) at para 30:

'[30] The sentence was undoubtedly a heavy one. In this regard much of what was said in the judgments of Lewis AJA and Olivier JA in *S v Jimenez* 2003 (1) SACR 507 (SCA) ([2003] 1 All SA 535), concerning the correct approach to sentencing drug dealers, can be applied mutatis mutandis to the facts of this case and need not be repeated. To my mind the most significant distinguishing feature is the quantity of the drugs carried in by the appellant. While the street value (well over R2 million, according to the expert evidence) is materially more than in *Jimenez* and the other authorities referred to by counsel, more important is the number of lives potentially affected by the abuse of the drug. The appellant must have reconciled himself to sowing the seeds of destruction, directly and indirectly, in the lives of a substantial number of people, including children. That consideration alone far outweighs his personal circumstances and justifies a very long incarceration.'

This passage was referred to, with approval, by the Constitutional Court in *Cwele* v S [2012] 4 All SA 497 (CC) at para [33].

These words are quite apt in this matter, the appellant having been exposed as the seller of the drugs to all end sundry for his own financial benefit.

[19] Finallly, Bosielo AJP (as he then was) said in *S v Bartlette* (CA&R 92/07) [2008] ZANCHC 5 (15 February 2008) at paras 3 – 11:

'[3] It remains a salutary and well-established principle of our law that sentencing resides pre-eminently within the discretion of the trial court. The powers of an appeal court to interfere with the sentence imposed by the trial court are therefore clearly and seriously circumscribed. Undoubtedly, this is intended to avoid unjustified erosion of the sentencing powers and discretion of the trial court by the appeal court. Over the years our courts have given different interpretations to the test to determining when the appellate court can interfere with a sentence imposed by the trial court. Regrettably in the process some subtle confusion has crept in and created some serious uncertainty. However, the acid test to determine when interference with a sentence by an appeal court is justified was, in my view, lucidly and authoritatively enunciated in *S v Kgosimore* 1999(2) SACR 238 (SCA) at p 241 para [10] where Scott JA stated the following:

> "[10] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. (Compare S v Pieters 1987 (3) SA 717 (A) at 727G - I.) Either the discretion

was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so. I can, accordingly, see no juridical basis for the stricter test suggested by counsel; nor is there anything in s 316B of the Act, or for that matter s 310A, to suggest otherwise. (See also S v Anderson 1964 (3) SA 494 (A).) It follows that, in my view, whether it is the Attorney - General (now the Director of Public Prosecutions) or an accused who appeals against a sentence, the power of a Court of appeal to interfere is the same."•

[4] As the confusion surrounding this test did not appear to have dissipated, the Supreme Court of Appeal saw the need to define if not refine the test further. In S v Malgas 2001(1) SACR 469 (SCA) at p478 para[12] Marais JA elaborated on the test as follows:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."•

[5] In determining whether the sentence imposed on the appellant is disturbingly inappropriate or shockingly disproportionate to the crime for which he was convicted, the court must consider the offence, its effects and its consequences or impact on the broader society and balance that against the personal circumstances of the appellant.

[6] There is no doubt that the offence for which the appellant was convicted is very serious. Both counsel for the appellant and respondent were agreed on this aspect. It is clear from the charge sheet that the appellant was in the serious business of dealing in and distributing quite a bewildering array of drugs which included 48 ecstasy tablets, 2 grams of heroin, 9 LSD tablets, 1 full moon cocaine crystal, 2 halfmoon cocaine crystal, 1 quarter cocaine crystal, 3 grams of cocaine, 7 grams of heroin, 150 ecstasy tablets, 10 grams of heroine and another 10 grams of cocaine. The total value of all these drugs amounted to R 26 000-00.

[7] I now have to consider and weigh the appellant's personal circumstances against the nature and seriousness of this offence as fully set out above. At the time of the commission of this offence the appellant was 29 years old with two minor children; since the appellant lost his job in Johannesburg in 1997, he has never been

employed; it is not clear if the appellant is married or not; the appellant has one previous conviction for assault with intent to cause grievous bodily harm.

[8] In considering an appropriate sentence, the magistrate found that the interests of society far outweighed the personal circumstances of the appellant. He furthermore, found, correctly in my view, that the effects and impact of drug abuse in our communities are far-reaching if not catastrophic. This motivated him to find that the element of deterrence and retribution should enjoy precedence over reformation and rehabilitation of the appellant. I can find no fault with this approach.

[9] The problem of drug-trafficking has haunted mankind for many years. With the passage of time, it has metamorphosed into a huge and intricate business enterprise which involves drug-lords, couriers, so-called runners and those who buy and use it. As far back as 1989, Kriegler J (as he then was) had the following to say about drugs and their effects in *S v Howe* 1989(2) SA 473 (W) at 478 E-G.

> "Die gebruik van dwelmmiddels is verwerplik. Oor die jare heen het die Staat, dit wil sê Wetgewer, uitvoerende gesag en die regsplegende gesag, by herhaling sy onwrikbare teenstand teen hierdie maatskaplike euwel te kenne gegee. Te meer nog is daar stryd gevoer teen handelaars in dwelms. Die verfoeilikheid van hul rol is by herhaling beklemtoon. Hulle teer op verslaafdes. Hulle poog om hul bose besigheid in stand te hou en uit te brei. Dit doen hulle in die wete dat hul handelsvoorraad moreel verwerplik en maatskaplik benadelend is. Hulle is ook 'n noodsaaklike skakel in die verspreidingsnetwerk. Dit geskied met winsbejag."

[10] I strongly believe that it is no exaggeration to state that, with the effluxion of time, instead of abating the problem of dealings in drugs concomitant with drug abuse has become pandemic. It has developed into a serious malignant cancer which is fast eroding the social and moral fabric of our society. This is notwithstanding the tough stance taken by the Legislature, coupled with the severe sentences which our courts impose. There is hardly a day that passes without a report in the media of some people arrested for either dealing in drugs or using drugs or importing them into our country. In recent times our country has been seriously invaded by a variety of drugs which are imported from some overseas countries. Quite paradoxically, our country has become a safe haven for drug-lords since the advent of democracy. We are caught in the big and intricate web of international drug-trafficking. What is even more frightening is how drugs have found their way into our schools which used to be regarded as safe citadels for our children. Our youth, students and even school children are at a serous risk of becoming drug addicts. In the quest for quick profit, the unscrupulous drug peddlers make no distinction. Nobody is spared from this scourge as drug-dealers spread their tentacles more wider. They sell their drugs to everybody including our youth, students and school children. In fact because of their youthfulness, naivety, peer pressure and simple gullibility, our youth have become their easy target.

[11] It is not surprising that Steyn AJ described drug dealers as follows in *S v Randall* 1995 (1) SACR 559 (C) at 566(i):

> "Drug dealers are unscrupulous criminals. They will use the weak, the gullible, and, may I add, the greedy. They are without conscience. They do not care for those who facilitate their evil objectives, nor do they have a concern about the lives they ruin by trafficking in drugs. Society is at risk should it hesitate to use every legitimate mechanism at its disposal to protect itself against their destructive designs. One of these weapons - and I emphasise that it is only one of them - is to make it clear to courier and principal alike, that the game is not

> worth the candle and that the price society exacts for transgressions will not be tempered by concern for the plight of the weak and the greedy."

Commenting further on this ubiquitous and intractable problem Steyn AJ once again expressed himself strongly as follows in *S v Sebata* 1994(2) SACR 319 (C) at 325b-e

> "Those who deal in these drugs, or who participate in the process of making such dealing possible, must expect to receive sentences which include substantial periods of imprisonment from our Courts. All the decisions emphasise the devastating impact the substances have on the lives of those who can become exposed to them, more especially the youth. It is therefore the duty of the Courts, in so far as sentencing plays its role as a deterrent, to use the sentencing process as effectively and wisely as possible in combating the incidence of these offences.
>
> It is trite to say that each case must depend on its own facts. The personal factors operating in appellant's favour are that he is a relatively young person and a first offender. However, the following considerations need also to be given weight when one has to assess an appropriate penalty. Appellant did not give evidence as to what his role was. Was he merely a courier or was he part of a broader conspiracy to import cocaine into a new market? He expressed no remorse, he entered the country illegally on a false passport and he failed to co-operate with the police in their attempts to uncover those who were perhaps even more seriously involved in the commission of the offence."•

I am in respectful agreement with the above-quoted apt description of drug dealers and the strong aversion expressed by the court against drug-dealers.'

[20] Having regard to the facts in this case, in particular the appellant's continued drug dealing over a period of many years and without showing any remorse for his actions, I am of the view that the appellant is a person deserving of the sentence imposed by the magistrate.

[21] The appellant was incarcerated from 2002 to July 2005, i.e. a period of 3 years on the conviction and sentence of 20 years imprisonment, which have been set aside. This, the magistrate could not take into account as the conviction had not been set aside when the appellant was convicted and sentenced by the magistrate in the current matter. This would, in my view, be an appropriate case to take the period of imprisonment so served into account by antedating the sentence by 3 years. The appellant should have the benefit of 3 years incarceration as if it was served for the conviction in this matter.

[22] We have considered whether to remit the matter to the magistrate for re-consideration of sentence. However, having regard to the long delay and the

fact that all factors are before us, it would be in the interests of justice to finalise the matter.

[23] In the circumstances the sentence imposed by the magistrate is set aside and substituted with the following:

'The accused is sentenced to a period of 8 years imprisonment on each of the four counts. The sentence is antedated to 7 November 2010.'

WEPENER J
JUDGE OF THE
GAUTENG HIGH COURT
JOHANNEBURG LOCAL DIVISION

I agree.

VALLY J
JUDGE OF THE
GAUTENG HIGH COURT
JOHANNEBURG LOCAL DIVISION

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