


REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
LOCAL DIVISION, JOHANNESBURG

CASE NO: A120/2014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED
	
27 MAY 2014	EHD VAN OOSTEN

In the matter between

ISAAC NGEMA

APPELLANT

and

THE STATE

RESPONDENT

Drugs - contravention of s 4(b) of the Drugs and Drugs Trafficking Act 140 of 1992, having been in possession of an undesirable dependence-producing substance, 'being 0,023 grams of Diacetylmorphine, commonly known as heroin' - sentence of 8 years' imprisonment imposed - appeal against sentence - material misdirection concerning mass of substance - injustice resulting from sentence imposed - urgent release of appellant ordered prior to hearing of appeal - appeal upheld - sentence reduced to 5 months imprisonment

J U D G M E N T

VAN OOSTEN J:

[1] The appellant, after a plea of guilty, was convicted in the Magistrates' Court Johannesburg, of a contravention of s 4(b) of the Drugs and Drugs Trafficking Act 140 of 1992, having been in possession of an undesirable dependence-producing substance, 'being 0,023 grams of Diacetylmorphine, commonly known as heroin'. He

was sentenced to 8 years' imprisonment. The matter was submitted for review to this court under the provisions of s 302(1)(a)(i) read with s 304 of the Criminal Procedure Act 51 of 1977 (the CPA). The review came before Wright J who confirmed the conviction as in accordance with justice but referred the matter 'to an urgent appeal, on the question of sentence before two judges of the Gauteng Local Division, Johannesburg'. This is the appeal presently before us.

[2] The reason for the matter being submitted for review and the order made by Wright J, is the following: The magistrate, in his judgment on sentence, referred to exhibit "B", which had been handed in being an affirmation in terms of s 212 of the CPA, by warrant officer Mayekiso, a forensic analyst attached to the chemistry section of the SAPD forensic science laboratory. The affirmation deals with the receipt, analysis and certification of the substance which is the subject matter of this case. As for the mass of the substance, it is recorded: 'The mass of the exhibit material was 0.0230 g'. In regard hereto the magistrate remarked:

'I see the prosecutor has read the charge and the annexure is (sic) as per the charge sheet, that it was 0.023 grams, but according to Exhibit B, your (sic) 212 statement, it is 0.0230 grams. *There is a zero there and that is a lot of heroin*'. [emphasis added]

The decimal arithmetic applied by the magistrate was clearly wrong. There is plainly no difference between 0.023 and 0.0230 grams. The quantity remains 23 milligrams or put differently, 23 thousandths of a gram. The misdirection caused the magistrate to find that the appellant was 'lucky' that he was not 'actually dealing in drugs' and proceeded to impose a sentence of 8 years' imprisonment. I consider it necessary to comment further on the way in which the magistrate dealt with the question of sentence. Halfway through the judgment on sentence, the magistrate interrupted the course of the judgment and enquired from the appellant concerning a previous conviction of possession of dagga, which he had admitted: 'Can you tell me what was the charge here? Was it possession of drugs or dagga?' to which the appellant responded 'Possession of dagga, your worship'. Later in the judgment the magistrate once again interrupted himself and enquired from the appellant where he came from and when he had come to Johannesburg. The ineptness of the magistrate's handling of such an important aspect as sentence is disquieting. It was obviously the perceived 'lot of heroin' that led the magistrate to impose such a harsh, unjustified,

disproportionate and shockingly inappropriate sentence. This resulted in a serious miscarriage of justice.

[3] The appeal before us was enrolled for today as a matter of urgency in an attempt to remedy an injustice. Having read the record of the proceedings in preparing for the hearing of the appeal, I formed the firm view that the sentence of 8 years' imprisonment was shockingly inappropriate and that immediate steps were to be taken for the release of the appellant from custody. I requested counsel for the respondent to approach me in chambers in order to discuss the immediate release of the appellant. Counsel very fairly raised no objection thereto. I accordingly issued the following order on 6 May 2014:

1. The appellant must be released unconditionally from prison immediately.
2. Judgment in the above appeal, which has been set down for hearing on 27 May 2014, setting out the reasons for the order in paragraph 1 above, will be delivered after the hearing.

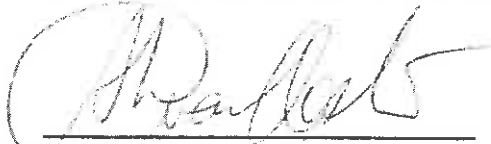
[4] Considering the sentence afresh, as his court is now at large to do, the following factors are relevant. The appellant is 28 years' old with no dependants. He passed grade 11 at school and earned a meagre 'income' of some R50 per day in washing taxis. The previous conviction I have referred to is dated 16 August 2011 and is for possession of dagga in respect of which a sentence of R300 or 60 days imprisonment, wholly suspended for 3 years on certain conditions, was imposed. The appellant, at the time of his release had already spent a total of some 11 months in custody, approximately 5 of which in awaiting finalisation of the trial. The quantity of heroin is minute and clearly was for personal use. The time served by the appellant in custody is more than sufficient to be taken into account as a basis for the sentence to be imposed. In my view having regard to the totality of the circumstances, a sentence of 5 months imprisonment is appropriate.

[5] In the result the following order is made:


1. The appeal against sentence is upheld to the extent that the sentence imposed is set aside and substituted with the following sentence:

'The accused is sentenced to 5 months imprisonment.'

2. The commencement of the sentence is antedated to 5 December 2013.


FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.


Z BUTHELEZI
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT

ATTORNEY JESSE PENTON

COUNSEL FOR THE RESPONDENT

ADV P SCHUTTE

DATE OF HEARING

27 MAY 2014

DATE OF JUDGMENT

27 MAY 2014