GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A70/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

17/rd 2019
DATE

SIGNATURE

In the matter between:

ABDULLAH LAMBAT Appellant

And

THE STATE Respondent

JUDGMENT

COERTSE AJ :

[1] On 12 May 2016 Appellant was charged with one count of dealing in drugs in that he contravened the provisions of Section 5 (b) read with sections 1, 13, 17 to 25 of the Drug and Drug Trafficking Act 140 of 1992 as amended. Alternatively, he was charged with possession or use of drugs in that he contravened sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 as amended.

[2] Appellant in this matter was found guilty on the alternative count of possession or use of drugs in that he contravened sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 as amended. On 25 August 2015 he was found in possession of an undesirable dependence producing substance as listed in Part III of Schedule 2 of the Act.

[3] He pleaded guilty to the alternative count of possession of the substance found in his possession which plea was changed in terms of section 113 of the Criminal Procedure Act ('the CPA') but having heard evidence, the appellant was convicted of possession of 0.55grams of methamphetamine and 42 glass pipes containing methamphetamine ["the drugs"].

[4] Accused applied for leave to appeal against his sentence and the application was dismissed. He then petitioned the High Court of South Africa, Gauteng Local Division, Johannesburg and leave to appeal was granted on 29 April 2019 in respect of sentence only.

[5] He was found in possession of 0.55 grams of the drugs while he was sitting in his motor vehicle as well as 42 glass pipes in the boot of his car. He filed a statement in terms of Section 112 (2) of the Act 51 of 1977 effectively pleading guilty to the alternative charge of possession of the drugs. He was sentenced to an affective term of five [5] years imprisonment of which two [2] years were suspended for five [5] years on condition that he not be convicted of contravening sections 3, 4 & 5 of Act

140 of 1992 as amended committed during the period of suspension. He is a first offender.

[6] He spent two weeks in custody before he was sentenced. He was incarcerated immediately on 18 September 2018 and is currently serving his sentence.

[7] The crisp issue to be decided is whether in the circumstances of this case the trial court misdirected itself in imposing a lengthy custodial sentence on a first offender who had pleaded guilty to the possession of a very small quantity of the drugs.

[8] Counsel for the appellant referred to the matter of *S v Kgosimore* 1999 (2) SACR 238 (SCA) wherein the approach of a court of appeal on sentence is summarised. The apposite part of the SCA's direction is "... whether the reasoning of the trial court ... can be said to be startlingly inappropriate or to induce a sense of shock ..."

[9] The court of appeal's attention was further drawn to *S v Malgas* 2001 (1) SACR 469 (SCA) at 478 D-G and I quote:

> "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." [My cursive].

[10] 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 if 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."

[11] In essence, this court of appeal finds that the disparity between the sentence that it would have imposed had it been the trial court is so marked that it can only be described as "shocking", "startling" or "disturbingly inappropriate" and consequently considers itself to be at large to interfere with the sentence of effectively imprisonment of five years for a very small quantity of drugs of 0.55grams.

[12] The only case that the court of appeal was referred to compare sentence was *S v Hammond* 2008 (1) SACR 476 SCA. Hammond was convicted in a district magistrate's court of dealing in 3.22 kg of methcathinone ["cat"] and sentenced to 12 years imprisonment. Cat is also categorised as an undesirable dependence producing drug and similarly listed in Part III of Schedule 2 of the Drugs Act. Hammond lodged an appeal to the High Court in Johannesburg against both conviction and sentence which was dismissed. With leave of the court he appealed to the Supreme Court of Appeal (SCA). The appeal against his conviction was dismissed and the appeal against sentence was upheld. The SCA subsequently

replaced the trial court's sentence with five years imprisonment and an additional two years imprisonment which were suspended on condition that Hammond is not again convicted of any offence under the Drugs and Drug Trafficking Act 140 of 1992.

[13] It bears mentioning that this court would also have been able to interfere if regard is had to the following misdirection: the magistrate convicted the appellant of possession of the drugs and the 42 glass pipes but, in my view, sentenced the appellant as if he had been convicted of dealing in the drugs. This inference can be drawn from the following excerpt from the judgment on sentencing:

> "The only evidence this court has is that you are selling it to the Nigerians, and that is a very aggravating factor, as big aggravating factor, 42 pipes were found in your possession with methamphetamine in it. You had two packets already in your possession."

[14] The appellant's personal circumstances as presented by his legal representative are as follows:

14.1. He was 35 years old at the time he was sentenced, married and has two minor children aged 15 and 3 years of age. He resided with his wife and children and was financially supported by his family.

14.2. At the time he was sentenced he had an amount of R3000 [three thousand rand] to pay as a fine and he was a first offender whilst he had pleaded guilty to the alternative charge.

[15] The Appellant and the State left the imposing of an appropriate sentence to the discretion of the court of appeal. In light of the fact that "... 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" compared to the Hammond-case where Hammond was sentenced to effectively seven years imprisonment for dealing in cat weighing 3.22 kg compared to the 0.55 gram of drugs and 42 glass pipes containing residue found in possession of the appellant, therefore the court of appeal is at large to uphold the appeal against sentence and to set the sentence of the trial court aside.

[16] The court of appeal is alive to the fact that the appellant has been incarcerated from 18 September 2018 to 17 October 2019, which is exactly one year and one month. We hold the view that the time he has served is sufficient and accordingly hold that an appropriate sentence ought to have been imprisonment of one year and one month.

[17] I accordingly grant the following order:

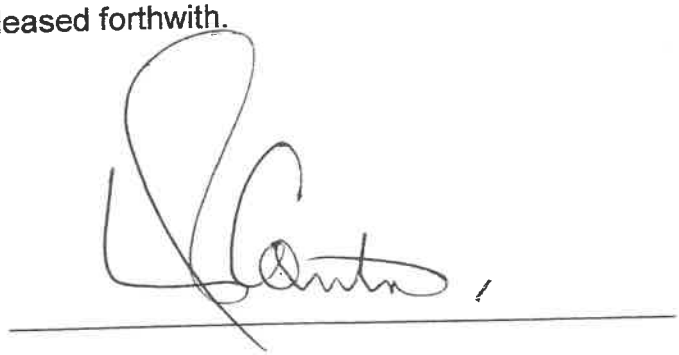
17.1. The appeal against the sentence is upheld.

17.2. The order of the Magistrate dated 18 September 2018 relating to the imposition of a sentence is set aside and replaced with the following: "The accused is sentenced to a term of imprisonment of period of one year and one month."

17.3 The order declaring the drugs and 42 pipes forfeited to the state remains in force.

17.4 The order declaring the appellant unfit to possess a firearm remains in force.

17.5 The appellant is to be released forthwith.



C.J. COERTSE
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree

I. OPPERMAN
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Appearances:
Counsel for the Appellant: Adv C. de Beer
Instructed by: Saders Attorneys
Counsel for the Respondent: Mr M. Mashego
Instructed by: Office of The Director of Public Prosecutions Gauteng Local Division, Johannesburg