IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***10th December 2019*** Signature: _____

APPEAL CASE NO: A122/2019
COURT *A QUO* CASE NO: 68/673/2015
DPP REF NO: 10/2/5/1-(2019/101)
DATE: 10th December 2019

In the matter between:

MAPHISA: QINISO Appellant

- and -

THE STATE Respondent

JUDGMENT

Adams J (Notshe AJ concurring):

[1]. This is an appeal by the appellant, who was legally represented during a portion of the trial and unrepresented during the latter part of his trial in the Orlando Magistrates Court (Magistrate J S Skosana), against his sentence of

sixteen years direct imprisonment after having been convicted on a charge of dealing in an undesirable dependence producing substance, namely 98g of cannabis, commonly known as dagga. He had pleaded not guilty on the charge of dealing in dagga, but was convicted on the 12th of September 2018.

[2]. On the same day, being the 12th of September 2018, the appellant was sentenced to sixteen years direct imprisonment. It is against his sentence of sixteen years direct imprisonment which the appellant appeals. The appeal is with the leave of the trial court, which was granted on the 10th of October 2018.

[3]. The actual count to which the appellant pleaded guilty and on which he was convicted was formulated as follows:
That he is guilty of contravening section 5(b), read with sections 1, 13, 17, 18 and 25, of the Drugs and Drug Trafficking Act, Act 140 of 1992, as amended ('the Drugs Act') in that on or about the 7th April 2015 and at or near Orlando the appellant did unlawfully and intentionally deal in an undesirable dependence-producing substance, *to wit* 98 grams of cannabis, commonly known as dagga.

[4]. The allegations against the appellant was that he contravened the provisions of the Drugs Act by dealing in drugs when, during an entrapment, he sold to a police officer a small quantity of dagga for the purchase price of two rand. At the same time, he was found in possession of 98 grams of dagga. All of this, according to the State, happened at his shack in the Orlando area from which he was selling the dagga. The 98 grams of cannabis which was found on his person by the arresting officer, who also acted as the 'trap', was the sum total of the dagga found in the possession of the appellant. A search of his shack on the day did not produce anything more than what was found by the police when they body searched the appellant.

[5]. Importantly, the charge against the appellant made no reference to the provisions of s 51(2) of the Criminal Law (Sentencing) Amendment Act, Act 105 of 1997 ('the CLAA'), read with part II of schedule 2 of the said Act, in terms of which a minimum sentence is applicable to an offence referred to in section 13(f) of the Drugs Act where the value of the dependence producing substance in question is more than R50 000. In any event, there can be no doubt that the

provisions of this section are not applicable *in casu* and therefore the minimum sentence provisions do not find application herein. The State accepted that the value of the dependence producing substance in respect of the charge against the appellant was not anywhere near R50 000. The only evidence in that regard related to the amount of the purchase price paid by the police officer, that being two rand. He was found in possession of eleven more packets of dagga, simirlar to the one sold to the police officer for two rand. Applying some basic arithmetic, it can safely be accepted that the appellant was found in possession of dagga, which he presumably intended selling, worth approximately twenty four rand – hardly indicative of a drug dealer involved in the peddling of serious drugs on a large scale.

[6]. Before turning to consider whether the sentence imposed on the appellant was appropriate, a brief consideration of the background facts is necessary. The appellant, who was 32 years old when he was sentenced, was caught in an entrapment, which had been organised by the Orlando Police Station, after they had received a tip-off from a woman, who was not called as a witness, that the appellant was selling dagga to school children. This claim by the State is not supported by any admissible evidence, although, from a reading of the judgment on the sentence by the Magistrate, it appears that this consideration weighed heavily on the mind of the Magistrate. Moreover, the circumstances during the arrest of the appellant do not seem to suggest that dagga was being sold to school children by the appellant, who was operating his dagga selling business from his shack.

[7]. The appellant appeals against his sentence of sixteen years direct imprisonment on the basis that the Magistrate misdirected himself in that he did not attach sufficient weight to the personal circumstances of the appellant. He also attached undue weight to the fact that the appellant, who was a first offender for all intents and purposes, so it was submitted on behalf the appellant, supposedly sold the dagga to school children. There was no basis for this finding. The Magistrates Court ought to have imposed a lesser sentence, so it was contended by the appellant.

[8]. The personal circumstances of the appellant, to which the Magistrate had regard, are as follows: At the time he was sentenced, the appellant was thirty two years old. He has no children, but he was taking care of the children of his deceased sister. His highest level of education is grade ten and at the time of the trial in the Magistrates Court, he was unemployed. These circumstances, so the appellant contended, are mitigating and ought to have been taken into account by the Magistrate, who should have imposed a lesser sentence.

[9]. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[10]. We are not convinced that, all things considered, the offence which the appellant had been convicted of is of such a serious nature that it warranted a sentence of sixteen years direct imprisonment. Whilst he was indeed convicted of dealing in drugs, there can be no doubt that he was not even a big fish in a very small pond. He was simply a small scale seller of cannabis. The flip side of the coin though is that dagga is seen as an entry level drug, which may lead to harder forms of drug abuse, making the conduct of the appellant somewhat reprehensible.

[11]. No judicial officer is oblivious to the scourge of drugs in our society. This is the type of offence that strikes at the heart of our society. The scourge of drug abuse and addiction which people like the appellant fuels destroys the very fabric of our society. It leads to all sorts of evils with unimaginable consequences. While all this happens, drug-dealers continue to ply their trade, with an arrogant and callous disregard to the costs to society, only to satisfy their insatiable lust for money and power. It is in cases like these that the interest of society demands a harsh sentence in order to be protected from people like the appellant.

[12]. We are nevertheless of the view that the sentence which the Magistrates Court imposed is unduly harsh or inappropriate (see *S v Kgosimore,* 1999 (2) SACR 238 (SCA)). It was argued on behalf of the appellant that the trial court over-emphasised the seriousness and prevalence of the offence above the

appellant's personal circumstances and thereby left no room for mercy in his sentencing. Importantly, it was contended on behalf the appellants that the trial court misdirected itself in attaching undue weight to the claim by the state that the appellant was selling dagga to school children. There was no legal basis or factual basis for such a finding. We find ourselves in agreement with these submissions.

[13]. Ordinarily, sentencing is within the discretion of the trial court. An appeal court can only interfere with the sentence imposed if the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[14]. We are of the view that, having regard to the aforegoing, the sentence of sixteen years direct imprisonment imposed on the appellant is unduly harsh and inappropriate. It is so disproportionate and shocking that no reasonable court would have imposed it. Accordingly, we are of the view that this court should interfere with the sentence imposed by the trial court.

[15]. Taking into consideration all the known factors, we are of the view that a sentence of direct imprisonment for a period of one year and three months on the charge of dealing in dagga is appropriate. We are alive to the fact that the appellant has been incarcerated from the 12th of September 2018 to the date of this judgment, which is almost exactly one year and three months. We are of the view that the time which the appellant has served to date is sufficient and adequate punishment for the crime of which he had been convicted. It is for this reason mainly that we are of the view that an appropriate and fair sentence ought to have been direct imprisonment for a period of one year and three months.

[16]. It follows that the appeal against sentence must succeed.

Order

Accordingly, the following order is made:

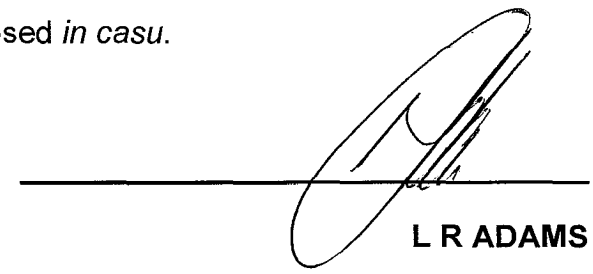
(1) The appellant's appeal against the sentence imposed on him by the court below succeeds and is upheld.

(2) The sentence in respect of the conviction on the charge of dealing in dagga is set aside and in its stead is substituted the following sentence:
'The appellant is sentenced in respect of his conviction on a charge of dealing in dagga to direct imprisonment for a period one year and three months'.

(3) The order declaring the dagga found in possession of the appellant on the date of his arrest forfeited to the State remains in force.

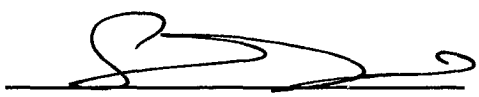
(4) The sentence is antedated to the 12th of September 2018.

(5) The appellant shall forthwith be released from prison if his imprisonment is only based on the sentence imposed *in casu*.



L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,



V S NOTSHE
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	5th December 2019
JUDGMENT DATE:	10th December 2019
FOR THE APPELLANT:	Adv E A Guarneri
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv Kalikhan
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg