IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A173/2019

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

26/02/2020
DATE

SC Mia

In the matter between:

CAJETON UGWU CHIDI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MIA, J:

[1] On 11 November 2015 the appellant was charged with dealing in cocaine in contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (Act 140 of 1992) in the Regional Court, Kempton Park. He pleaded guilty and was convicted of dealing in 2649.63 grams cocaine, a dangerous dependence producing substance on the same date. He was sentenced to fifteen years imprisonment on 13 November 2015. The appeal against sentence is with leave of the trial court. The appellant requested condonation for the late filing of their heads of argument in the matter. The application was not opposed by the State. The application for condonation was granted.

[2] The partially reconstructed record was placed before this Court. Mr Guaneri, appearing for the appellant, contended that there were sufficient facts on record upon which to argue the appeal. Mr Guaneri referred to *S v Maake* 2011(1) SACR 263 SCA where the Court held that "*it was not only a salutary practice, but obligatory, for judicial officers to provide reasons to substantiate their conclusions*". Ms Mokwatedi, appearing for the State, submitted that whilst the full record was not available, it was clear which facts the magistrate took into account in determining the sentence.

[3] In the present matter the trial court furnished reasons for its sentence which took into account the usual factors including the personal circumstances of the appellant, the nature and seriousness of the offence and what appears to be the interest of society. The rationale for furnishing reasons as stated in *S v Maake supra* that "*A court of appeal had an interest in knowing why a judicial officer had made a given order*" have been met in our view. In light thereof there is no need to refer the record back there being no prejudice to the appellant or the respondent as their heads of argument had been filed, this Court proceeded with the matter to ensure that there were no further delays.

[4] The facts upon which the appellant was found guilty are as follows. On 4 April 2015 the appellant was at O R Tambo International Airport, Kempton Park, in transit to Nigeria after he disembarked from a flight coming from Brazil. He was approached by a police officer who requested permission to search his two bags. He agreed and upon searching his bags a substance was found in the soles of the shoes in his bags which the police officer suspected to be drugs. When confronted about this the appellant confirmed knowing that the bags contain such substances. The substance was analyzed in the forensic science laboratory and found to be cocaine. The appellant admitted that he knowingly, wrongfully and unlawfully was in possession of substances which constituted an offence in terms of Act 140 of 1992. He explained that he had no money to attend a funeral in Nigeria and agreed to deliver the bags to a woman upon his arrival in Nigeria.

[5] In sentencing the appellant, the trial court took into account the personal circumstances of the appellant. At the time of his sentencing the appellant was 48 years old. He was married with three children aged 6, 4 and 2 years old and that his wife was unemployed. On his version, he was the breadwinner. The appellant was unemployed but took on odd jobs to provide for the family. The trial court considered the nature and seriousness of the offence in addition to the appellant's personal circumstances and imposed a sentence of fifteen years imprisonment.

[6] Section 13 (f) of Act 140 of 1992 provides that any person who contravenes section 5(b) shall be guilty of an offence. Section 17 provides that any person who is convicted of an offence under Act 140 of 1992 shall be liable- "*in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.*"

[7] Mr. Guaneri argued that having regard to the reconstructed record there were insufficient reasons indicated on the record to justify a sentence of fifteen years imprisonment. He referred to the case of *S v Klaas* 2018(1) SACR 643 (CC) where the Court referred to the matter of S *v Keyser* 2012(2) SACR 437 SCA, where a sentence of twenty years imprisonment was considered appropriate in light of the street value of drugs being over R2 000 000.00 (two million rand).

[8] He further referred to a various cases where the sentences varied based on the involvement of the offender which impacted on the term of imprisonment. Mr. Guaneri referred to the decision in *S v Oha and Another* 2015 [ZAGPPHC] 276 where a couple sentenced to twenty five years imprisonment had their sentences reduced to twelve and ten years imprisonment on the basis that the couple had minor children and their children would be prejudiced by their parent's lengthy imprisonment. He also referred to the case of *S v M (Centre for Child Law as Amicus Curiae* 2007 (2) SACR 539 (CC) but conceded that it was not wholly applicable as the appellant was not the only caregiver, the children were in the care of their mother in Nigeria.

[9] Mr. Guaneri argued that on the basis of the *Klaas* case *supra* the courts had made it clear that they deemed it appropriate that ten years imprisonment or more year was a sufficient sentence for convictions of dealing in drugs. In the present matter he argued that the appropriate sentence was ten to twelve years where the appellant was the breadwinner and had three minor children.

[10] Ms. Mokwatedi argued on behalf of the State that the legislation provided in section 51(2) Act 105 of 1997 for the sentence of a first offender to a period of imprisonment of not less than fifteen years imprisonment. She referred to the case of *Gamede and another v S* 2010 ZASCA 122, where the accused were sentenced to twenty years for dealing in drugs and the sentences were reduced to fifteen years where the appellant was a first offender and forty years old and five years because the offender played no role in the manufacturing of the substances.

[11] Ms. Mokwatedi emphasized that in the present matter, the trial court was correct in taking into account the nature of the offence along with the personal circumstances of the appellant. She referred to the case of *Umeh v S* 2015(2) SACR 395 (WCC). She argued that in *Umeh* the Court stated that *" it is in cases like these that the interests of society demands a harsh sentence in order to be protected"*, thus the trial court in considering the nature of the offence considered that a sentence was required that would protect the interests of society.

[12] She argued further referring to *S v Rabie* 1975 (4) SA 855 (A) that sentence was a matter for the trial court and ought only be altered where there had been a material misdirection or was disturbingly inappropriate. She argued that neither position could be argued in the present matter. The State did not challenge the evidence regarding the personal circumstances of the appellant, however the children were in the care of their mother in Nigeria and the appellant placed no further information before the court about their circumstances. She argued that at sentencing the trial court was required to take into account the appellant's personal circumstances, the seriousness of the offence which was evident and the interest of society. In having regard to those three factors it could not be argued that the sentence imposed was inappropriate or that there was a misdirection on the part of the trial court.

[13] Having regard to the submissions of both counsel I am guided by *"the principle that punishment is pre-eminently a matter for the discretion of the trial Court"*. I have considered the submissions of Mr Guaneri which effectively, requests that the sentenced be reduced to ten to twelve year's imprisonment based on the *Klaas* case *supra,* which he argued held that ten years or more was appropriate for dealing in drugs. I have considered the submissions made by Ms Mokwatedi on behalf of the State.

[14] In Klaas *supra* the Court considered at para [36] that:

> "In considering an appropriate sentence, we have to take into account the applicant's personal circumstances, the mitigating and aggravating circumstances, as well as the interests of society."

The trial court had regard to the above factors and noted that the offence was serious. This could be viewed as an aggravating factor.

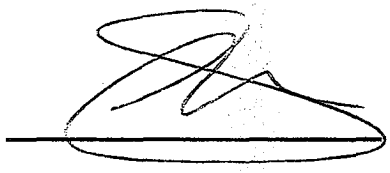
[15] Whilst the value of the drugs was not known in the present matter other factors may well influence the court as indicated in *S v Keyser supra* where the Court stated:

> "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."

[16] I see no reason on the facts to erode the discretion of the trial court where it has not been demonstrated that the sentence is inappropriate or that there has been a misdirection by the trial court. I am mindful of the further principle enunciated by the Court in *S v Rabie supra "that the sentence should only be altered if the discretion has not been "judicially and properly exercised".* There is no indication that the trial court has not exercised its discretion judicially. It has had regard to all of the factors usually considered in sentencing as argued by Ms Mokwatedi. In view hereof I am satisfied that there is no reason to interfere with the sentence handed down by the trial court. Upon the facts before me there is no reason to reduce the sentence.

[17] In the circumstances, I propose that the following order be made:

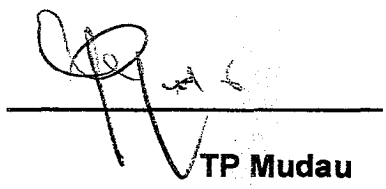
The appeal against sentence be dismissed.



S C Mia

Judge of the High Court, Johannesburg

I agree and it is so ordered.



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Judge of the High Court, Johannesburg

Appearances:

On behalf of the appellant	:	Adv. E A Guaneri
Instructed by	:	Johannesburg Justice Centre
On behalf of the respondent	:	Adv. M Mokwatedi
Instructed by	:	DPP
Date of hearing	:	20 February 2020
Date of judgment	:	26 February 2020