IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICH IS NOT APPLICABLE	
(1) REPORTABLE:NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: YES/NO	
(4) 14 September 2020	*pp*

CASE NO:A209/2019

In the matter between:

TEBOGO MANGANYE **APPELLANT**

And

THE STATE **RESPONDENT**

Summary: Appeal against sentence. Principles governing sentencing restated. The appellant charged of contravening Section 5 (b) read with section 17 and 25 of the Drugs and Drug Trafficking Act, convicted and sentenced to 18 years.The sentence set aside on the ground that the court a quo failed to properly apply the principles of sentencing. The sentence set aside and replaced with the sentence of 4 years, with 1 year suspended for 5 years.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be on 14 September 2020.

JUDGMENT

VUKEYA AJ

Introduction

[1] This is an appeal only on the sentence which served before this court with leave of the court a quo. The appeal was with the consent of both parties considered on the papers properly before this court, in particular the heads of argument which were electronically filed on caselines.

[2] The appellant in this matter was convicted in the Orlando Magistrate's Court on a charge of contravening Section 5 (b) read with section 17 and 25 of the Drugs and Drug trafficking Act,[1] (Dealing in drugs) after he was found with 0.57 grams of heroin (diamorphine). He was sentenced to imprisonment with no option of a fine. He now in this appeal pleads for a lesser sentence than what the court a quo imposed on him.

[3] The appellant was legally represented and pleaded not guilty to the charges.

Background facts

[4] On 22 January 2018 the appellant was arrested at Diepkloof Zone 2 as the police were patrolling in the area. The appellant was the only person amongst a number of people who saw the police and started running away. The police gave chase and apprehended him. They searched him and found in his person 10 small plastic bags containing heroin and cash to the value of R 288, 00. The contents of these small plastic bags of heroine were put together and weighed and were found to be weighing 0.57 grams.

[5] As stated above the appellant was convicted for dealing in drugs and sentenced to 18 years imprisonment without an option to pay a fine.

Grounds for appeal

[1] Act number 140 of 1992.

[6] The appellant contends that the court a quo misdirected itself by over-emphasizing the interests of society and failing to sufficiently take into consideration his personal circumstances. It has been submitted on the appellant's behalf that he is a 23 year old first offender and because of his youthful age, there exist real prospects of him being rehabilitated. He is a care giver to his 4 year old daughter whose mother does not contribute to her upbringing. It is further submitted that the sentence of 18 years imprisonment is shockingly inappropriate as it is disproportionate to the value of the drugs found with the appellant and was imposed without due consideration of his personal circumstances.

[7] The respondent conceded in the heads of arguments that the sentence imposed is shockingly inappropriate and has submitted that it stands to be set aside and replaced with a lesser sentence.

The legal principles

[8] In *S v De Jager and Another,*[2] it was held that the duty of sentence falls within the judicial discretion of the trial court. The appeal court will only interfere if the trial court has misdirected itself or has committed an irregularity during the sentencing process which is prejudicial to the accused and requires interference or the sentence is so disturbing that it induces a sense of shock.

[9] The main issue in the present matter is whether a sentence of 18 years of direct imprisonment is a suitable sentence for a first offender convicted for dealing in drugs where the value of the drugs in question is 0.57 grams. The court must first determine if there are any grounds that justify interference in the case at hand before deciding whether the sentence can be interfered with.

[10] It is trite law that when a court passes sentence, it has to consider the triad which comprises of the accused's personal circumstances, the nature and seriousness of the offence he has committed as well as the interests of the society. The approach to adopt to be adopted in this regard is that which set out in *S v Zinn.*[3]

[2] 1965 (2) SA 616 (A).
[3] 1969 (2) SA 537 (A).

In that case court held that it is expected of the court to weigh and balance all the relevant factors in considering the sentence to impose. The court cautioned against one factor being unduly accentuated at the expense of and to the exclusion of the others.

[11] When determining sentence the court a quo took into consideration that the provisions section 17 (e) of the Drugs and Drug Trafficking Act 140 of 1992 prescribes a sentence of 25 years imprisonment for persons convicted of dealing in drugs. It is apparent from the reading of the judgment that it paid little attention to the appellant's personal circumstances. The appellant's personal circumstances were not given the appropriate weight. It stands out from the appellant's personal circumstances that he is a first offender and that he is a primary care giver to a 4 year old minor child.

[12] Being a first time offender is a mitigating factor on its own although it does not automatically entitle an offender to a non-custodial sentence. This factor is looked at together with others and it does not necessarily over-ride other factors to be taken into consideration when determining sentence. The real purpose of bringing up that one is a first offender is to actually bring to the court a clear picture of the person the court is about to sentence. In the case of the appellant, he has never been in conflict with the law before and subsequent to his arrest he got convicted for dealing in drugs to the total value of 0.57 grams. Clearly the appellant is a chancer who was probably trying his luck with drugs.

[13] Before his arrest the appellant was working at a car wash earning approximately R1 000.00 per month, with which he took care of himself, his daughter; his nephews and nieces. The court a quo drew a negative inference from the fact that the appellant works at a car wash and concluded that a car wash and drugs go hand-in-hand. This statement is an unfortunate conclusion and unfair to the appellant because there was no evidence that the appellant was found selling drugs at the car wash. All what the court a quo needed to do was to consider that even with the low levels of employment we are experiencing as a country, the appellant was trying his best to survive and maintain his family with the little amount he was getting from working at the car wash. The sentence imposed on him was done without

thorough consideration of those facts and obviously with an over-emphasis on the seriousness of the offence and the fact that the court can impose a sentence of up to 25 years.

[14] I am mindful of the fact that section 17 (e) of Act 140 of 1992 permits Magistrate's Courts to exceed their jurisdictional limits and extends it up to 25 years but Magistrates should avoid getting excited by the lengthy sentences they can pass even where circumstances do not allow. Although their discretion is not taken away from them, they still have a duty to exercise it judiciously and strive to achieve a reasonable balance of the elements of the triad after careful consideration of all factors relevant to sentencing.

[15] Judicial officers live in the same society where this offences are being committed, they are oblivious of the problems our country is facing involving the sale and the use of drugs by young people of this country. Dealing in drugs is the type of crime that kills the very core of our society and it is destroying our young people. It is easy to get emotional and let your emotions get the better of you but when determining an appropriate sentence under these circumstances, presiding officers must approach sentencing in a manner that recognises fair punishment as pointed out by Corbett JA In *S v Rabie*,[4] where he remarked as follows:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him.
Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality."

[16] What the court a quo stated in the judgment is that on the previous day he had sentenced a person to 16 years imprisonment for dealing in dagga and that the appellant had been convicted for a more serious offence than the person on the

[4] 1975 (4) SA 855 (A).

previous day. He then proceeds to sentence the appellant to 18 years imprisonment saying he has considered his personal circumstances and the fact that he is a first offender. The sentence passed on the appellant does not reflect that his personal circumstances were considered at all but shows that the court a quo only wanted to break his own record of 16 years imprisonment and pass a lengthier one.

[17] It is clear from the above statement that the court a quo was not interested in considering the personal circumstances of the appellant but focussed more on the seriousness of the offence and the interests of the society. It totally ignored that the appellant is a primary care giver to a 4 year old child.

[18] In *S v M*,[5] it was held that the best interests of a child are paramount in every matter affecting a child. Section 28(2) of Constitution of the Republic of South Africa, 1996 carries the paramount principle. Although the principle should not to be applied in a way that obliterates other valuable and constitutionally protected interests, when imposing sentence, factors such as that the convicted person is a primary care giver to minor children are to be taken into account. A focused and informed attention is to be given to interests of children at appropriate moments in the sentencing process and the form of punishment imposed should be one least damaging to interests of children, given the available choices.

Evaluation/analysis

[19] I am inclined to agree with the appellant's counsel in his contention that the court a quo should have considered that the appellant is a primary care giver of a minor child and should have given attention to the Constitutional provision that in all matters concerning children, their rights are paramount. It is clear from the judgment and the sentence that the interests of the minor child of the appellant were not given any attention. The appellant did explain that even though there are other people in his household, he was responsible for his child and looked after her interests.

[18] When applying the principles as applied in the case of S *v De Jager and another* (supra), I am of the opinion that the cout a quo did not exercise its discretion judiciously as expected. It misdirected itself and committed an irregularity which was

[5] 2007 (2) SACR 539 (CC).

prejudicial to the appellant by failing to consider that the appellant is a primary care giver to a minor child and that he is a first offender who has never been in conflict with the law before. The drugs he carried in his person were also of a very small value which does not justify a sentence of 18 years imprisonment. I therefore find that interference by this court with the sentence of the court a quo is justified.

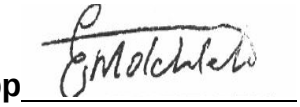
Order

[19] In the premise I propose that the following order is made:

1. The appeal against sentence is upheld;

2. The sentence of 18 years imprisonment is set aside and replaced with the following:

(i) The accused is sentenced to four (4) years imprisonment, of which one (1) year imprisonment is suspended for a period of five (5) years on condition he is not again convicted for the contravention of section 4 (b) or 5 (b) of Act 140 of 1992 committed during the period of suspension.

pp 

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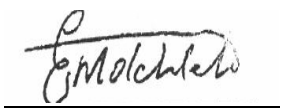
Acting Judge of the High Court,

Johannesburg.

I agree



E Molahlehi

Judge of the High Court,

Johannesburg

Representation:

For the state: Adv. N Serepo

For the Appellant: Legal Aid South Africa

Date of hearing: 01/09/2010

Date delivered: 14 September 2020.