



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: **16 November 2021**

Signature: _____

APPEAL CASE NO: A37/2021

COURT A QUO CASE NO: CD21/2020

DPP REF NO: 10/2/11/1-2021/032

DATE: 16 November 2021

In the matter between:

DE OLIVEIRA, JOSE ROBSON LOPES JNR:

Appellant

- and -

THE STATE

Respondent

Coram: Yacoob J and Khumalo AJ

Heard on: 28 October 2021 – This appeal was, by consent between the parties' counsel, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 16 November 2021 – This judgment was handed down electronically by circulation to the parties' legal representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 16 November 2021.

ORDER

On appeal from: Magistrates Court for the District of Ekurhuleni North, Kempton Park (District Magistrate Maila sitting as Court of first instance):

(1) The appellant's appeal against his sentence is dismissed.

JUDGMENT

Khumalo AJ (Yacoob J concurring):

Introduction

[1] The appellant is a 29-year-old Brazilian National. He entered the Republic of South Africa via the OR Tambo International Airport ("OR Tambo") on a flight from Brazil on 16 February 2020. Upon his arrival at OR Tambo, he was approached by airport security personnel who asked to search him. He was taken to a Hospital in Kempton Park where X-rays of his abdomen were taken. It was discovered that he had foreign substances in his bowel which were later identified as condoms stuffed with the drug known as cocaine.

[2] The appellant was arrested and later charged in the Kempton Park District Magistrates Court with contravening section 5(b) read with sections 1, 12, 17, 18 and 25 of the Drugs and Drug Trafficking Act 140 of 1992 ("DDTA"). He pleaded guilty to the offence and was sentenced to 12 years' direct imprisonment on 18 December 2020.

[3] The appellant applied for leave to appeal against his sentence in terms of section 309B of the Criminal Procedure Act ('the CPA') and leave to appeal was granted to this Court by the Magistrate.

[4] This appeal concerns sentence only.

Plea explanation and mitigating facts

[5] The appellant was 28 years old when he was sentenced on 18 December 2020. He is unmarried and does not have any children. He was diagnosed with the Human Immunodeficiency Virus (HIV) some eight years

prior. He worked as a Hairdresser in Sao Paulo Brazil and earned the equivalent of R 1000.00 a month. He supported his elderly mother who is diabetic.

[6] In his statement explaining his plea of guilty in terms of section 112 of the CPA, the appellant admitted that the substance found in his body was indeed cocaine amounting to 406.9 grams. He admitted that he knowingly, wrongfully, and unlawfully dealt¹ with the drug.²

[7] During his sentencing, the appellant claimed that he was asked to carry the substance by his boss (Danny). Danny also looked after the appellant's mother and occasionally paid for her medication. Danny had promised the appellant more money if he transported the cocaine to South Africa.

[8] There was no suggestion that the appellant was forced or tricked into carrying the drugs to South Africa. He did so to earn extra money. He admitted that he did so freely and voluntarily, and he believed that the drug would only be consumed by rich white South Africans.

[9] The appellant provided no other evidence in justification of his actions and the only mitigating factors placed before the Magistrate were his guilty plea, his age, his HIV status, his mother's health, and the fact that he was a first-time offender.

The offence and the sentence applicable

[10] Section 5(b) of the DDTA contains a statutory prohibition against dealing with certain drugs. It provides that no person shall deal in any dangerous dependence-producing substance³ or any undesirable dependence-producing substance, unless such a person falls under the exceptions listed in that subsection.⁴ It is not necessary to mention those exception here, save to state that the appellant does not fall under any of those exceptions.

¹ S1 of the DDTA defines to "deal in" as performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission, or exportation of the drug.

² S1 defines "drug" as any dependence-producing substance, any dangerous dependence-producing substance, or any undesirable dependence-producing substance.

³ Cocaine is classed in Schedule 2 Part 2 of the DDTA as a dangerous dependence-producing substance.

⁴ *Minister of Justice and Constitutional Development and others v Prince and others* 2018 (6) SA 393 (CC) at para [22].

[11] Section 13(f) of the DDTA provides that any person who contravenes a provision of section 5(b) shall be guilty of an offence. Section 17(e) of the DDTA, which deals with penalties, provides that any person who is convicted of an offence referred to in section 13(f) shall be liable 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.

[12] There was some confusion in Counsel's heads of argument about the applicable sentence. I believe that the confusion may have been caused by the fact that there is another Statute that governs sentencing in drug offences of this nature.

[13] Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 ("CLAA") provides that notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years.

[14] Among the offences listed in Part II of Schedule 2 is '*any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992)*', if it is proved that the value of the dependence-producing substance in question is more than R50 000,00.

[15] Section 51(3) of the CLAA provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[16] Although both Counsel before us stated in their heads of argument that the Magistrate was a Regional Magistrate, the charge sheet and the document styled "Additional Reasons of the Magistrate" make it clear that the appellant was charged and convicted in a District Court. That being the case, the provisions of CLAA do not apply since section 51(2) of the CLAA makes it clear that it only applies to cases before a Regional Court or a High Court.⁵

⁵ See *S v Jimenez* (73/2002) [2003] ZASCA 2; [2003] 1 All SA 535 (SCA) (21 February 2003) at paras 4 and 10.

[17] The Magistrate must also have been alive to this because she does not refer to the CLAA in her judgment on sentence. In fact, she makes no reference to it. The mere fact that she sentenced the appellant to 12 years imprisonment, which is less than the prescribed minimum sentence in terms of the CLAA, is a clear indication that the Magistrate did not apply that statute.

[18] In any event, the provisions of the CLAA could not be applied since there is no evidence, on record, as to the value of the cocaine found on the appellant. His plea of guilty also did not admit the value of the cocaine found in his possession.⁶

[19] The sentence applicable is therefore that set out in section 17(c) of the DDTA.

Grounds of appeal

[20] In the grounds of appeal, the appellant contends that the Magistrate overemphasised the aggravating factors over the personal circumstances of the appellant. He also contends that the Magistrate erred in placing more emphasis on deterrence and less emphasis on rehabilitation. The appellant contends further that the Magistrate failed to consider the ten months the appellant had already spent in custody since his arrest in February 2020 while awaiting trial.

Circumstances under which an appellate court can interfere with a lower court's sentence

[21] The principles applicable to sentencing and circumstances under which an appeal court can interfere with a sentence imposed by a lower court are trite. In *S v Hewitt* 2017 (1) SACR 309 (SCA) at paragraph 8, the Supreme Court of Appeal ("SCA") said:

'[8] It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists

⁶ Jiminez, *supra*, at para 12.

a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[22] In *Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi* 2018 (2) SACR 230 (SCA) at paragraph 15, the SCA stated the principle as follows:

'[15] It is trite that a wide discretion is allowed to a trial court in the assessment of punishment. In the absence of material misdirection by the trial court, the appeal court cannot approach the question of sentence as if the appeal court were the trial court, and then simply substitute the sentence of the trial court with that which it prefers. On the other hand, where the court of appeal finds sufficient disparity between the sentence imposed by the trial court and that which it would have imposed, the court of appeal is obliged to interfere.'

[23] Regarding the severity of the sentence, the appellant submitted that an effective sentence of 12 years' imprisonment is too severe and induces a sense of shock.

[24] In determining what is an appropriate sentence, a trial court must have regard to the triad of factors referred to in *S v Zinn* 1969 (2) SA 537 (A) at 540 G-H, being the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed.⁷

[25] The Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paragraph 10, while endorsing the factors in *Zinn*, also noted that sentencing is innately controversial and a lonely and onerous task. It went on to say that in the assessment of an appropriate sentence the sentencing court is also required to have regard to the main purposes of punishment, namely, its deterrent, preventative, reformatory and retributive aspects. It said that the quality of mercy, as distinct from mere sympathy for the offender, must be added.

[26] It is apparent from her judgment on sentence that the Magistrate did consider the factors in *Zinn* and *S v M*. That much is clear from the transcribed judgment.

[27] The appellant did not possess the cocaine for personal consumption. He says that it was going to be sold and distributed to rich white people in South Africa. On his own version, he travelled halfway around the world and brought

⁷ See also, *Lungisa v The State* [2020] ZASCA 99(9 September 2020) at para 9.

the cocaine to South Africa with the intention of selling it to South Africans and destroying their lives. The offence of dealing in cocaine is a serious one. It cannot be minimised or downplayed in any way. That the applicant thought that any resultant harm would only be to a few privileged people is irrelevant.

[28] In *S v Jiminez*⁸ at paragraphs 15 and 16 the SCA said:

[15] The crime committed by the appellant is very serious indeed. Drug trafficking inevitably results in grave harm to others and courts should ensure that the sentences they pass have the requisite deterrent effect. The appellant's conduct thus warrants a lengthy sentence of imprisonment even though he is a first offender in a foreign country without any familial support.

[16] A consideration of sentences recently passed for drug trafficking in similar instances is, as I have said, of assistance only in so far as the sentences indicate a general trend and hence a measure of consistency. Because the imposition of sentence (except in so far as the legislature prescribes sentences) is a matter of judicial discretion, requiring a consideration of factors that are peculiar to each case, the appropriate sentence for the appellant is one that takes into account his personal position as well as the interests of society.'

[29] The facts in *Jiminez* are in many respects similar to the facts in this case. *Jiminez* was a Colombian national who had been charged and tried in a District Court for contravening s 5(b) of the DDTA in that he had brought into the Republic 60 'bullets' of cocaine – that is, condoms filled with cocaine - that he had swallowed before boarding an aeroplane to come to South Africa. It was alleged that the weight of the cocaine was 653,4 grams and its value R210 000.

[30] The mitigating factors in *Jiminez* were that he was a first offender; was only 24 years of age at the time when the offence was committed; and had a wife and young daughter living in Colombia, of which he was a citizen. He had no family in South Africa, and therefore would have no familial support while he serves a sentence of imprisonment. He submitted in a statement to the trial court that the reason for bringing drugs into the country was to earn money to pay for a prosthesis for his brother who had been severely injured through being electrocuted in an accident.

[31] *Jiminez* had pleaded guilty to the charge and was sentenced to 12 years imprisonment. The SCA said the following regarding the 12-year sentence imposed against *Jiminez*.

⁸ See note 5 above.

[17] In my view, a sentence of imprisonment somewhat shorter than that imposed might have been more appropriate. The crime is grave and its consequences serious, but the mitigating factors presented are significant. It cannot be said, however, that the sentence of 12 years' imprisonment imposed by the court below was disturbingly inappropriate, or that the court did not exercise its discretion properly. There is accordingly no basis on which to interfere with the sentence passed.'

[32] But for his HIV-status, the appellant's circumstances are not that much different from those of *Jiminez*. There is no suggestion that he will not receive adequate treatment in South Africa. If he does become gravely ill, he may be entitled to parole should the relevant authorities consider it appropriate. He may also be entitled to parole after serving a portion of his sentence based on the laws governing paroles. *Jiminez* did of course have a young wife and child.

[33] I therefore cannot find any material misdirection in the Magistrate's judgment on sentence. She correctly applied the factors in *Zinn*. The 12-year sentence is not so inappropriate as to induce a sense of shock. It is the same as the sentence imposed in *Jiminez*.

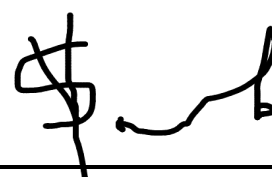
[34] This Court is accordingly not be entitled to interfere with the sentence imposed by the Magistrate. The only clarification I would add is that the 12 years must be taken to include the 10 months the appellant already spent in custody while awaiting trial. That was not clear from the Magistrate's judgment. Save for the clarification, I cannot fault the Magistrate's exercise of discretion on sentencing.

[35] The appeal must accordingly fail.

Order

The following order is therefore made:

- (1) The appeal is dismissed

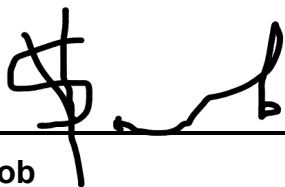


ff

S KHUMALO

*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

I agree, and it is so ordered,



S Yacoob

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON: 28 October 2021 – no oral hearing.

DATE OF JUDGMENT: 16 November 2021 – Judgment handed down electronically.

FOR THE APPELLANT: Advocate Guarneri

INSTRUCTED BY: Legal Aid South Africa, Johannesburg

FOR THE RESPONDENT: Advocate Mokwatedi

INSTRUCTED BY: The Office of the Director of Public
Prosecutions, Gauteng Local Division,
Johannesburg
