OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

CASE NO: A109/2015

DELETE WHICH IS NOT APPLICABLE

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

23/2/2016

In the matter between:

23/2/2016

SHELDON BRASS APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

VUKEYA AJ

[1] The appellant was convicted in the Vereeniging Magistrate's court on his plea of guilty to a charge of contravening Section 4 (b) of Act 140 of 1992 – possession of 0, 4 grams of the Methamphetamine drug. He was sentenced to three years

imprisonment in terms of Section 276 (1) (i) of Act 51 of 1977, without an option to pay a fine.

[2] His application for leave to appeal was only on sentence and it was granted by the court a quo.

[3] The appellant contends that the Magistrate had no regard to the triad as well as the principles of punishment and that he approached the sentence in a vindictive manner as opposed to an objective one.

[4] As the basis of his appeal, the appellant contends further that despite the Magistrate's acknowledgement of the fact that the appellant was a candidate for rehabilitation, he still passed a sentence of imprisonment without an option of a fine.

[5] The respondent argued that the sentence was justified and proportionate to the offence committed by the appellant.

[6] 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. See *S v De Jager and Another* 1965 (2) SA 616 (A).

[7] This court must first determine if there are any grounds that justify interference in the case at hand before deciding whether the sentence can be altered.

[8] 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. It is required of the court to weigh and balance those elements and strive to accomplish and arrive at a well-judged counterbalance between them in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.

[9] The primary bone of contention in the case at hand is whether a sentence of direct imprisonment was a suitable sentence compared to one where the appellant would be rehabilitated at an institution other than prison and get professional help for his drug problem.

[10] When determining sentence the Magistrate asked the appellant a few questions and the answers thereto did nothing but show that he was a person as described in Section 33 (1) of Act 70 of 2008. He extracted from the appellant information that showed that he had a drug problem but did not deem it just to intervene.

[11] The Magistrate made the following remarks in his judgment:

"Daar word genoem, ja jy was by 'n Rhema Kerk en jy het daarso behandeling gekry. Hoe lank het jy die kursus gevolg? Het jou ooit die kursus gevolg? Die hof word nie in kennis gestel nie. Daar is FAMSA, daar is SAMCA, jy kan na die hof toe stap. Hier is klerke maatskaplike werkers wat hier sit wat jou kan stuur vir rehabilitasie. Dit sal jou nie 'n sent kos nie"

[12] It is clear from the above statement that the Magistrate was not interested in considering other forms of punishment than the one he already had in his mind.

[13] The Magistrate also remarked as follows:

"Vir 'n pakkie methamphetamine is dit R100. Nou vra ek hierdie vraag. Jy is werkloos, waar kry jy die geld vir hierdie dwelmmiddels, wie voorsien vir u dwelmmiddels"

[14] The above statement indicates that the Magistrate was aware that the appellant was spending a lot of money on drugs, an element which shows that his addiction could be causing financial harm to the appellant or to his family because he was unemployed.

[15] Section 296 of the Criminal Procedure Act provides as follows:

> (1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such offence, order that the person be detained at a treatment centre established under the Prevention of and Treatment for Substance Abuse Act 70 of 2008 , if the court is satisfied from the evidence or from any other information placed before it, which shall in either of the said cases include the report of a probation officer, that such person is a person as is described in section 33 (1) of the said Act, and such order shall for the purposes of the said Act be deemed to have been made under section 36 thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

[16] The appellant had been convicted as a result of his guilty plea. It was clear from the factors brought to the attention of the Magistrate that he had a drug problem. The Magistrate was in a good position to *prima facie* conclude that the appellant's addiction was harmful to his welfare and the welfare of his family. The Magistrate could have therefore found that the appellant falls within the description of a person as defined in section 33 of Act 70 of 2008.

[17] In my opinion the Magistrate failed to give due recognition to the appellant's drug problem. He correctly stated to the appellant in his remarks that parents are experiencing challenges with children who use drugs and then become a problem to their families by stealing valuable assets to feed their drug addiction, but he disregarded every factor which should have been considered in favour of the appellant.

[18] The appellant was a first offender who pleaded guilty to possessing 0.4g of the methamphatemine. In my opinion the sentence of three (3) years imprisonment is shockingly inappropriate.

[19] When applying the principles as applied in the case of S *v De Jager and another* (supra), I am of the opinion that the Magistrate did not exercise his discretion judicially as expected, he misdirected himself and committed an irregularity which was prejudicial to the appellant and therefore I find that an interference by this court with the sentence of the court a quo is justified.

[20] With the heads of argument for the appeal on sentence came a point *in limine* in which the appellant brought to the attention of the court that it was discovered, from the Section 212 statement of the Forensic expert,
and after the appellant had been sentenced ; that the mass of methamphetamine found was actually 0,04g and not 0,4g as alleged in the charge sheet and admitted in the Section 112 (2) (Act 51 of 1977) statement.

[21] The parties are in agreement that this was an error, the mass was indeed supposed to be 0, 04 and not 0, 4 as pleaded. This information comes before the appeal court after the appellant has been convicted.

[22] In S v Karolia 2006 (2) SACR 75 (SCA) at 93b – h (para 36) the court said the following regarding factors emerging post sentence on appeal:

"The general rule is that an appeal court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards. However, the general rule is not necessarily invariable. Where there are exceptional circumstances the existence of which is unquestionable or the parties agree to the evidence being used, it is possible to take these factors into account and it is also possible to alter the sentence imposed originally where this is justified".

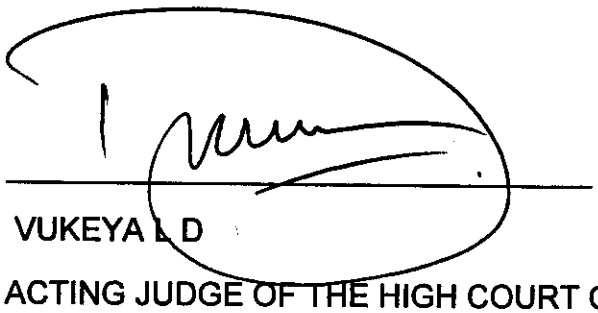
See also *S v Japhta* 2010 (1) SACR 136 (SCA).

[23] Because the parties agree about the new circumstances revealed to the court at this stage, and they agree that because this error occurred, the accused will be prejudiced by it if it is not considered; I am of the opinion that it is justified to take it into consideration when making an order herein.

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

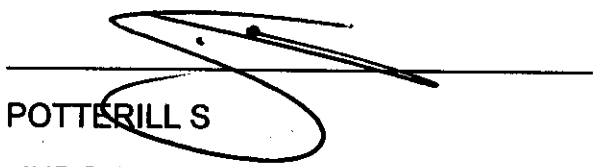
The appeal against the sentence is upheld and the sentence is set aside and substituted with the following order:

That the appellant is referred back to the Magistrate's Court to be dealt with in terms of Section 296 (1) of the Criminal Procedure Act 51 of 1977.



VUKEYA L D
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

I agree



POTTERILL S
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

HEARD ON: 18 February 2016
DELIVERED ON: 23 February 2016
COUNSEL FOR PLAINTIFF: ADV R J KOCK
ATTORNEYS FOR PLAINTIFF: Larry Laden Attorneys
COUNSEL FOR DEFENDANT: ADV S SCHEEPERS
ATTORNEYS FOR DEFENDANT: State Attorneys