**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**[Reportable]**

**CASE No: A106/14**

In the matter between:

**JOHN UMEH** **Appellant**

Vs

**THE STATE** **Respondent**

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**JUDGMENT DELIVERED ON 4 JUNE 2015**

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**HENNEY, J:**

INTRODUCTION

[1] The appellant was convicted on two (2) counts, namely, the contravention of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (dealing in drugs) and the contravention of section 22(A) (5) (f) of the Medicines and Related

Substances Act of 101 of 1965 (unlawful possession of Phenacytin) in the Regional Court at Khayelitsha.

[2] The particulars of the charges were the following, although not exactly so stated in the charge sheet. The allegations against the appellant in respect of the first charge are that on 23 March 2010 at around 14h00, the appellant contravened the provisions of the Act by dealing in drugs when he was found in possession of 49,23 grams of methamphetamine, that was folded in packets, during a police operation conducted at the N1 City Shopping Mall's parking area ("the N1 City incident").

[3] In respect of the second charge, the appellant alleged to have been dealing in crack cocaine, as well as 1485,90 grams methamphetamine, also either made up in individual packets or units, that were subsequently found at the appellant's house in Summergreens, after he had been transported there on 23 March 2010 ("the Milnerton incident"). In addition to these drugs, 25,19 grams of a substance known as Phenacytin was also found at his house. The appellant pleaded not guilty to both these charges.

[4] After conviction of the appellant in the Regional Court, the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 with regard to the imposition of minimum sentences were invoked. The appellant was sentenced to 15 years on each count. The Trial Court ordered that 5 years of the sentence on count 1 was to run concurrently with the sentence on count 2, an effective 25 years' imprisonment.

[5] The appellant was legally represented throughout the proceedings.

[6] This appeal is against the conviction on both counts and sentence.

GROUNDS OF APPEAL

[7] The appellant's appeal against conviction is broadly based on the following grounds: that the search and seizure carried out (at the N1 City Parking area and premises of the appellant) was unlawful and the evidence relating to the drugs found on his person at N1 City as well as those found at this home inadmissible; that alternatively, the Regional Magistrate erred in concluding that his version that he had no knowledge of these drugs that were found is not reasonably possibly true; and that the conviction on both counts amounts to a duplication of charges.

[8] Regarding sentence, the appellant argued that the Regional Magistrate misdirected himself in imposing the prescribed sentence of 15 years' imprisonment in respect of each count in terms of sections 51(2) of Act 105 of 1997, due to the fact that the State has failed to prove that such sentences would be applicable, and that the sentences imposed was in any event shockingly inappropriate.

[9] The trial proceeded with the evidence regarding the search of the appellant being placed in dispute. As a result of this a Trial-within-a-Trial was held. The issue that was disputed was whether the search was conducted lawfully and in

compliance with the provisions of section 22 of the Criminal Procedure Act 51 of 1977. After the Trial-within-a-Trial was held the court ruled the evidence found as a result of the search to be admissible.

THE EVIDENCE

[10] Detective Warrant Officer Alexander ("Alexander") from the Directorate of Priority Crime Investigation Unit (DPCI), South African Police Services, was the Investigating Officer with regard to dockets Goodwood CAS 515/03/2010 (the N1 City incident) and Milnerton CAS 743/03/10 (the search conducted at appellant's home). Lt. Colonel Cockrill and Warrant Officer Swart also from the DPCI also testified.

TESTIMONY OF ALEXANDER

[11] On 23 March 2010 Alexander received information that a Nigerian male would be delivering drugs at N1 City parking area and that he would be driving a Blue Nissan Micra with registration number C…….. He arranged with his senior, Lt. Colonel Cockrill, to assemble a team with several members of the South African Police Services to conduct an operation at the place mentioned.

[12] Alexander, along with the assembled team, later proceeded to N1 City where he noticed the vehicle. He kept it under observation until it came to a stop next to another parked vehicle, a White Nissan Sentra. Alexander immediately approached the vehicle. Only the appellant and his baby were in the car. He

knocked on the window, identified himself and produced his appointment certificate. The appellant hesitated and Alexander shouted at him. Other members (11 officers) were around the vehicle by this time. Alexander spoke in English.

[13] Eventually the appellant opened the door, and Alexander informed him that he had reason to believe that he (Appellant) had drugs in his possession. Alexander then asked him if he had drugs in his possession. The appellant did not respond. Alexander observed that he was shivering and appeared nervous. Alexander then asked him if he could search him. The appellant did not speak, but nodded his head affirmatively, which Alexander understood to be permission to search him. Alexander testified that if appellant had shaken his head left to right, he (Alexander) would have understood that to mean "*no*", in other words, a refusal of permission to be searched.

[14] The Trial Court ruled that the search was lawful and the evidence derived therefrom admissible and Alexander was recalled to testify regarding the search of the Appellant as well as his vehicle. He told the court where he discovered the packet of drugs placed and that he had informed the appellant of his constitutional rights. I will deal with the decision of the Regional Magistrate and the evidence of the State as well as the appellant regarding the admission of this evidence at a later stage.

[15] Alexander further testified as follows:

The police were aware of another person in a vehicle parked next to the appellant's car. Lt. Col Cockrill interviewed this person. He testified that this person had cash in his possession. The police verified his details. His name was Gershwin Maloy and stayed in Kraaifontein. The appellant did not inform the police at the time that he knew this person, nor that this person had made an appointment to meet him regarding the sale of his (appellant's) vehicle. Alexander further testified that the appellant failed to mention to the police at the time that this person had entered his vehicle and had spent time in it, before exiting it. The appellant also did not suggest at the time, that this person must have put/left drugs in the appellant's vehicle.

[16] Upon the request of the appellant, after having being apprehended by the police at N1 City, the police proceeded with him to his house in Milnerton as he had asked to leave his child there.

[17] In the garage the police found instruments and other items used in the processing and packaging of drugs, such as, inter alia, a jewellery scale and vacuum sealer. Alexander told the Court that in his experience these items were often found on premises where drugs were manufactured or found. The police found more drugs in the garage. In a bag they found 950 pieces crack cocaine as well as an amount of 15 units of methamphetamine (Tik) weighing 1485,90 grams. The appellant was arrested.

[18] The appellant's wife (accused no 2), the domestic worker (accused no 3) and a friend (Linda) was on the premises (The other two accused were acquitted by

the court *a quo*). The friend was released after her details had been verified. The Trial Court also questioned Alexander about the person in the other vehicle and Alexander furnished the court with all his details. Despite the fact that this person was continuously referred to by the defence as "*Jason*", he later identified himself as Gershwin Maloy.

[19] Alexander also furnished the details of the female known as Linda in the appellant's home and explained why he did not arrest her. The appellant during the Trial-within-a-Trial also testified and denied that he had given Alexander permission to conduct the search which I will also deal with at a later stage.

LT. COLONEL COCKRILL

[20] Lt. Colonel Cockrill ("Cockrill") from DPCI, SAPS, was the second State witness. He had 26 years' service in the police force at the time he testified in court. Since 1990, he had been involved in the investigation of drug related crimes and worked for the now defunct Narcotics Bureau of the Police Service. He is trained in the identification of drugs and he also underwent training at the Drug Enforcement Agency in the United States. He corroborated Alexander's evidence in all material respects, except that he was unaware of whether Alexander asked permission from the appellant to search him. He said that this was due to the fact that he was at that time busy with the other person in the Nissan Sentra.

[21] This person in the Nissan Sentra had an amount of R8 000,00 cash with him, but there was no evidence to link him to the drugs. This was despite the fact that

when the last number dialled on the phone of this person was called, the cell phone of the appellant rang. Cockrill conceded that the police had perhaps been too hasty and that they should have waited for the transaction to be finalised before they acted. Cockrill discovered the drugs in the garage of appellant's home, after they had searched the house of the appellant, where they found a vacuum sealer, which is normally used to seal drugs in small packets. They also found a jewellery scale that according to this witness is commonly used to weigh drugs. In a holder on the floor, they also found a substance known as Phenacytin, which according to the witness is commonly used in the illicit drug trade to produce cocaine. In the garage they observed that one of the walls had two loose bricks. He removed these two bricks. Behind them he found a piece of white rope that was attached to a bag that hung on the outside of the garage wall. When he opened the sealed plastic bag he found more drugs therein. The drugs that were found on the appellant at the N1 parking area weighed 49,23 grams and were found to be methamphetamine, also commonly known as "Tik", which according to him has a street value of R300,00 per gram.

WARRANT OFFICER SWART

[22] Warrant Officer Swart ("Swart") from the DPCI, South African Police Services, was the third witness for the State. He had 25 years' service. He corroborated the evidence of Alexander and Cockrill with respect to the drugs they found on the appellant as well as the drugs and equipment found at his house.

[23] According to him, the garage was not used by the appellant to park his car in

and he observed a short ladder in the garage. He conducted a search in the same place where Lt. Colonel Cockrill eventually discovered the drugs, but did not discover the drugs himself. He was cross-examined at length and was adamant as to the sequence of events and did not deviate from his version.

THE APPELLANT'S EVIDENCE

[24] The appellant testified. His version was that he had been falsely implicated in respect of both instances in which drugs were found. The police, with the assistance of the person who was in the white Nissan Sentra, had planted the drugs in his vehicle at N1 City parking and at his house. He testified that he believed that the drugs that were found on this person at N1 City, were placed in his car by the person he knew as "*Jason*" who got into his vehicle before the police arrived. He had to meet this person to discuss the sale of his (appellant's) vehicle at N1 City Mall.

[25] Jason left, whereafter the police arrived. The appellant testified that while he was searched by the police outside of his vehicle, he observed that another policeman was busy in the car. He could not however see what the policeman was doing in the car. He says Alexander went to the side of his vehicle, at the place where "*Jason*" was sitting before he got out of the vehicle, and he saw Alexander with a packet in his left hand. While the other policemen were still holding him, Alexander came, with this packet in his possession, and then he started forcing it inside his trousers.

[26] In respect of the first incident, before the police arrived, this person, who is also known as "*Jason*", in the course of their discussion of the sale of the vehicle, got into the back of his vehicle, while they were discussing the sale of his vehicle. He also denied any knowledge of the drugs that were found at his house and suspected that this person by the name of "*Jason*" was involved in placing the drugs at his house and informed the police where to find them.

EVALUATION

[27] Coming back to the Trial-within-a-Trial, Alexander testified on behalf of the State to have the evidence of the search and seizure admitted. He testified that after having received information from some source, he, after this information proved to be accurate as to the identity of the person who was alleged to have possessed the drugs and the car with a particular registration number which such person was to be driving, approached the appellant. On approaching the appellant and after having satisfied himself that it was indeed the correct suspect on the basis of the information he received, he requested the permission of the appellant to search him.

[28] According to him, he received such consent from the appellant and proceeded to search him. His evidence was that he told the appellant that he had reason to believe that he was in possession of drugs to which the appellant did not respond. He was only shivering and appeared nervous.

[29] Mr King, on behalf of the appellant, argued in the appeal that the court *a quo*

erred in accepting the evidence of Alexander, that the appellant had given consent that he be searched. He argued that Alexander never testified that the appellant gave his permission; rather, the prosecutor virtually placed the words in his mouth by leading the witness in this regard. Alexander had testified as follows in this regard: "*I then told him I'm going to ask him if I can body search him, seeing that he didn't answer anything*". He went on further and said, "*At that stage he didn't say yes or no. He just nodded his head*". The prosecutor then put it to Alexander … "*Now, I noticed when you said he nodded, your head motion indicated up and down as in acknowledging permission or giving your permission. Is that what you understood*". Alexander then said, "*Yes, Ja, what I understood seems just if it was no, then he would have shaken his head left or right*". Then the prosecutor put it to Alexander' "*His head would have gone left to right*", to which Alexander answered' "*Ja*". The appellant denied that he gave consent to be searched. During evidence, the appellant confirmed that when he has to answer a question in the affirmative, he would nod his head.

[30] Mr King construed the words of Alexander, "*I told him I am going to ask him if I can body search him"* to mean that Alexander merely told him that he would search him, but this is not what Alexander said. He said that he told him, "*I am going to ask him*", whereafter the appellant did not say anything. He just nodded his head in affirmation to the question. In cross-examination, Alexander was adamant that he had asked permission from the appellant who nodded in affirmation and granted him permission.

[31] He further testified that in the light of information he had, even if the appellant

did not give permission to be searched, he would have searched him anyway.

[32] Mr King further argued that because the colleague of Alexander, Cockrill, did not ask the permission of the person in the White Sentra to search him, in all probability Alexander also would not have asked the appellant for such permission.

[33] Mr King argued that Alexander failed to state in his police statement that he asked the appellant permission to search him. He also argued that the evidence of Alexander that was accepted by the Regional Magistrate was unreliable and untruthful. This, especially where it emerged that while Alexander was accompanied by 11 other policemen, no one heard that the appellant gave him consent to search him. He further argued that Alexander relied on hearsay evidence of an unknown person who gave the information about the appellant.

[34] If regard is to be had to the totality of the evidence and on the basis of the probabilities, I am of the view that the Regional Magistrate was correct in ruling as admissible the evidence of Alexander to the effect that he (Alexander), was given permission by the appellant to search him.

[35] Furthermore, if regard is to be had to the probabilities, should Alexander have wished to falsely implicate the appellant, it would have been much easier to have simply planted the drugs at one place and at one occasion, rather than having to explain in elaborate detail about how drugs were found at two different placed far apart from each other, which in any event was not placed in dispute by the appellant.

[36] It needs to be mentioned that other witnesses, Cockrill and Swarts, never testified during the Trial-within-a-Trial, but more importantly, it seems neither of them were present at the vehicle of the appellant when Alexander spoke to the appellant initially. Cockrill testified that he approached the occupant of the Nissan Sentra that was parked next to the Nissan Micra. While he was busy with this occupant, he heard that they had found drugs on the appellant.

[37] Swarts testified that when he arrived at the scene, Alexander and the other members were already there. The other more important point is that no-one could have heard the appellant give consent because the evidence of Alexander was that when he requested permission or consent to search the appellant, he responded by shaking his head up and down in affirmation. I cannot agree that the Regional Magistrate was wrong in finding that Alexander's evidence that the appellant gave him permission to search him was truthful and justified. The Magistrate's conclusion is consistent with the probabilities and other objective evidence. It is also clear that the operation concluded was justified, based on, as it turned out, the accuracy of the information which Alexander had received, in that:

a) he found a Nigerian male;
b) in a Blue Nissan Micra with registration number C……. and;
c) that such person was in possession of drugs.

Therefore even if Alexander did not have permission from the appellant to conduct

the search, there was enough information objectively to justify a search upon the appellant without such permission.

[38] On 29 May 2015, Mr King filed with the consent of the State a copy of an unreported judgment which emanated from an appeal in the matter of *Amobi Enujukwu v The State; Case No: A775/03* delivered in this division on 9 December 2004 by *Franks AJ* wherein the legality of a search and seizure in terms of the provisions of sec 22 of the Criminal Procedure Act No.51 of 1977 was also considered. The facts in that particular case are the following. The appellant, whilst standing on a pavement, near the corner of Main and Hall Roads in Sea Point, in the company of two other gentlemen, was approached by the police. One of the policeman testified that when the three gentlemen saw the police vehicle, one of them, dived into a vehicle that was standing nearby. The policeman, upon observing this, regarded this conduct as suspicious and proceeded to search the persons concerned.

[39] The appellant in that matter was searched and drugs were found in two small containers that were hidden in his socks. The court *a quo* found that the appellant had given consent to be searched. A policeman in cross-examination presented further evidence that he had told the appellant, "*I am going to search you*", whereupon the appellant responded, "*Go ahead and search me*". The appellant's evidence in this regard is that the police did not ask any permission. The court in this matter on appeal found that there was uncertainty whether the appellant had actually consented to being searched. It found further that there was no indication that the appellant was advised of his rights to refuse being searched. And even if such consent was given, such consent was not informed consent.

[40] The court also then concluded that there were no reasonable grounds on the part of the police to believe that a search warrant would be issued if applied for and that the delay in obtaining such warrant would defeat the object of the search.

[41] In my view, the *Enujukwu* case, as referred to by Mr King, cannot be regarded as authority for a finding that the search and seizure in this matter was not in accordance with the provisions of sec 22 for the following reasons:

41.1 As already indicated, I found the evidence of Alexander that he had been given the necessary consent for the search truthful and persuasive.

41.2 With regards to whether the requirements of sec 22 (1)(b) of the Criminal Procedure Act had been complied with, the facts in this case are clearly distinguishable from the facts in the *Enujukwu* case. In that particular case, the reasons given by the policeman as to why he believed that reasonable grounds existed that a warrant would be issued if applied for, are the following:

a) the area where the search took place was notorious, many drug related offences had occurred there and his unit had made numerous arrests in or near that vicinity;

b) upon noticing the police vehicle, one of the group of men made a

sudden movement and ducked down into the car, and it was the policeman's view that the person who ducked down into the car possibly wanted to hide something in the motor vehicle or remove something from it;

c) that on approaching the group, the policeman kept his eye on the appellant and he noticed that he appeared to be nervous.

41.3 In this particular case, Alexander received information from a source that on 23 March 2010 a Nigerian male would be sitting in a Blue Nissan Micra with registration number CA…….. at the parking area near the KFC at N1 City Mall and that this person would have drugs in his possession. Upon arrival at the place indicated to him, he found this Blue Nissan Micra which matched the description as given to him by his source with regards to the make of the car, the colour and registration number. In it he found a male, ie. the appellant, who was later shown to be of Nigerian descent. Upon searching this person, he found that this person had drugs in his possession.

41.4 The fact that the information had proven to be accurate before he found any drugs in possession of the appellant, in my view would have constituted reasonable grounds for Alexander to believe that a search warrant would be issued if applied for. Furthermore, should he at that stage have first gone to a Magistrate or Justice of the Peace to obtain a warrant, the object of the search would in all probability have been defeated.

41.5 Furthermore, on the basis of the authority in *State v Lachman 2010 (2)*

*SACR 52 SCA*, the position of the court in *S v Enujukwu* that the appellant had to be advised of his right to be refused to be searched, was clearly wrong. *Griesel AJA* in the *Lachman* matter held that it was not correct to argue that consent obtained was not reliable because, firstly, the appellant in that matter had not been advised that he could object to the search and, secondly, that any articles seized could be used in evidence against him. In the *Lachman* case, *Griesel AJA* also confirmed the court ***a quo's*** view that there was not any provision requiring the police to advise a subject that it was open to him to refuse to allow a search to be undertaken.

[42] After having found that the version of Alexander regarding the drugs that were found on the person of the appellant at N1 City to be true. I will now deal with the decision of the Magistrate to convict the appellant despite the fact that according to Mr King his version was reasonably possibly true.

[43] It is clear that drugs were found in possession of the appellant at N1 City as well as his home in Milnerton. I am in agreement with the finding of the Regional Magistrate that the version of Alexander regarding the finding of the drugs at N1 City is to be accepted. As to the drugs found at the house of the appellant, he gave a version that it was someone else's drugs that were planted. I will now deal with the evidence of the appellant as regards to the drugs that were found on his person as well as that which were at his house.

[44] The appellant's counsel argued that his version should have been found by the Regional Magistrate as reasonably possibly true. I have already expressed a

view regarding the probabilities of such a version, when I dealt with the evidence of Alexander in relation to the version of the appellant that the drugs were planted on him by Alexander at the N1 City Parking Mall. Regarding the drugs that were found hidden at his house, he testified that he had no knowledge thereof. According to him these drugs must have been planted by the person known to him as *"Jason*" or *"Jackson"*. The person in the White Sentra, the police referred to this person as "*Gershwin*". This person, he said, used to, around November 2009 stay opposite to where he stayed in Summergreens, Milnerton. He once again said that this person colluded with the police to plant the drugs at his house.

He testified that he had no knowledge of the drugs that were found in the bag hanging on the outside of the garage. He suspects that *"Jason"* was responsible for placing the drugs there. The person with the name of Linda was at the house when the police arrived. She was the girlfriend of "*Jason*". He only realized at a later stage, long after his arrest, that "*Jason*" who used to come to his home to borrow a ladder, may have been responsible for the placing of the drugs in the bag that was found by the police. All of this evidence is without substance and based on conjecture and in my view is unconvincing and the Regional Magistrate rightly rejected his version.

[45] If regard is to be had to the undisputed evidence about the further items found at the appellant's house, which includes the finding of a sealer, a jewellery scale and glass jars with traces of cocaine and the substance known as Phenacytin which is used to manufacture crack cocaine, the court can only conclude that the appellant was busy with several acts in connection with dealing in drugs.

[46] I am satisfied that the Regional Magistrate was correct in finding that the State had proved its case beyond reasonable doubt.

DUPLICATION OF CHARGES

[47] Mr King argued that if the court should find that drugs were in both instances seized, due to the fact that such drugs came from the same source, the appellant had a single intention to deal in drugs irrespective where and how the drugs were found. On the basis of this, he argued, that there was only a single intention to commit one offence and not two separate offences. There was therefore a duplication of charges. Ms Heeramun for the State disagreed and argued that the Appellant committed two separate and distinct offences.

[48] In considering whether there is duplication or splitting of charges, regard is to be had to the definition of "*deal in*" in terms of the Act. The Drugs and Drug Trafficking Act 140 of 1992 defines "*deal in*" as the following:-

> *" in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug."*

*J.R.L. Milton, Hoctor and Cowling; South African Criminal Law and Procedure Vol III Part 1 (2ed)* describes "*deal in*" in drugs as follows in terms of the Drugs and Drug Trafficking Act:

"*Dealing in drugs consists in and embraces all of the following activities:*

- *dealing (in the ordinary sense) in drugs*
- *transshipping drugs*
- *importing drugs*
- *cultivating drugs*
- *collecting drugs*
- *manufacturing drugs, which activity includes*
  *preparation of drugs*
  *extraction of drugs*
  *production of drugs*
- *supplying drugs*
- *prescribing drugs*
- *administering drugs*
- *selling drugs, which activity includes*
  *offering for sale*
  *advertising for sale*
  *possessing for sale*
  *exposing for sale*
  *disposing, whether for consideration or otherwise exchanging*
- *transmitting drugs*
- *exporting drugs*
- *any act performed in connection with these activities*." (emphasis added)

It is clear that a wide definition is given by the Legislature to the concept of "*deal in*" in terms of the Act.

[49] In *S v Mabuya 1979 (3) SA 1070* A at pages *1076H – 1077E* it was held that even though a person in a broad sense throughout had the intention of dealing, where such person however commits more than one prohibited of act of dealing, it could in no way be considered as a single continuous event ('n enkele voortgesette gebeurtenis), merely because he had the broad intention to deal throughout. The court argued that by applying the so-called "evidence test" for duplication of convictions as set out in *S v Grobler en 'n ander 1966 (1) SA 507 A*, the evidence in respect of one count cannot be used to prove the other count at the same time.

[50] In analysing whether there may be a duplication of charges with reference to the definition of "*deal in*" in the previous act (Section 2(a) of Act 41 of 1971) *Trengrove JA* held in *Mabuya* (*supra*) at 1076 H – 1077E that:

> *"Die appellant het wel in 'n breë sin deurgaans die opset gehad om in dagga handel te dryf, maar die verbode handelinge waaraan hy skuldig bevind is kan hoegenaamd nie as 'n enkele voortgesette gebeurtenis beskou word nie. Dit kan ook nie in hierdie geval gesê word dat die getuienis met betrekking tot een aanklag ook meteen die ander aanklagte bewys nie. (S v Grobler en 'n Ander1966 (1) SA 507 (A) op 511G - H en S v Prins en 'n Ander1977 (3) SA 807 (A) op 814C - D.) Mnr Beckley het egter sterk gesteun op die uitspraak van STRYDOM R in S v Claassens; S v Philander1976 (3) SA 304 (SWA). In hierdie saak het die geleerde Regter met verwysing na die bepalings van art 2 van die Wet op 306E - 307A gesê: "The punishable fact in the offences of dealing in and possession of dagga has a common factor, ie a presently existing state of affairs. The Act does not aim at penalizing a person who had dispossessed himself of the harmful dagga nor one who has ceased to deal therein. It is directed at the possessor and the person who deals therein. Past conduct or acts can only serve as evidential material towards establishing the existing conduct and the extent thereof which may be relevant on the question of sentence. Both conceptions necessarily involve preceding activities leading up to a moment in time, being, as I see it, the time of arrest, which then encompasses past conduct and may culminate in the first conviction... In my opinion the Legislature created two offences and an accused cannot be convicted of so many counts of each as the individual acts built up to be punishable facts. These offences are possession and use in contrast to 'deal in'."*
>
> *Na my mening is dit nie die regte benadering tot die uitleg van art 2 nie. Art 2 (a) bepaal weliswaar dat iemand wat in dagga "handel dryf" aan 'n misdryf skuldig is, maar volgens art 1 beteken "handeldryf" in dié verband "ook 'n handeling verrig in verband met die insameling, invoer, lewering, oorlaai, toediening, uitvoer, verbouing, verkoop, vervaardiging, versending of voorskryf" van oa dagga. Hiervolgens is dit duidelik dat die bewys van 'n voortgesette of deurlopende gedragslyn, oor 'n bepaalde tydperk, nie 'n voorvereiste vir 'n skuldigbevinding aan*

> *oortreding van art 2 (a) is nie; die bewys van 'n enkele handeling wat binne die statutêre omskrywing van "handeldryf" val (bv die verkoop van 'n enkele dagga sigaret) sal op sigself as voldoende bewys van 'n oortreding van art 2 (a) aanvaar word."* (Emphasis added)

See also *S v Ebrahim & Others 1974(2) SA 78 (N) 80-1; S v Madlalose 1974(2) SA 74 (N)*.

[51] The inference is clear that in respect of the drugs found in the possession of the appellant at the N1 City parking area, the appellant had taken such drugs from his home and he had transported them to N1 City for a specified purpose.

[52] It is clear if regard is to be had to the drugs and the circumstances under which it were found at the house of the appellant and the drugs that were earlier found in his possession at N1 City, the inference is escapable that those drugs were also in his possession for the purposes of dealing with. It was a considerable amount that was made up in small little packets.

[53] The evidence establishes clearly that the appellant is a person that deals in drugs. Besides the drugs that were found in his possession, the police also found at his premises a jewellery scale, which was used to weigh the drugs, a vacuum sealer, which was used to seal the drugs in plastic wrapping for the appellant to sell it in loose units, and a substance known as Phenacytin, which is used in the production of crack cocaine. The activities such evidence proves fall within the statutory definition of dealing (for example, manufacturing, which includes preparation of drugs).

[54] With respect to the drugs found in the appellant's possession at N1 City parking area, it is my view that such had been transported from the appellant's house with the intention to deliver them to someone else for the purpose of dealing. Such activities, in my view, are separate and distinct from those relating to the drugs found at the appellant's premises. In respect of the latter, the appellant not only possessed drugs for distributing; he was also involved in manufacturing such drugs, preparing them (in units), then weighing and packing them for distributing and sale to drug users and other dealers.

[55] Although he in a broad sense throughout had the intention of dealing in these drugs which were both found in his possession at N1 City and at his house, the activities described above cannot be considered as a single continuous event that constitutes one offence. It can hardly be said that the evidence to prove the offence of dealing on the one count (N1 City) also proves the offence of dealing as contemplated in the Act on the other count (with respect to his house in Milnerton). The Regional Court was therefore correct in convicting the appellant on two separate offences.

THE MINIMUM SENTENCE

[56] The court *a quo* found that the appellant was guilty in respect of both charges of an offence listed in Schedule 2 Part 2 read with Section 51 of the Criminal Law (Sentencing) Amendment Act 105 of 1997, it being an offence referred to in Section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) where the value of the dependence producing substance in question is more than

R50 000,00.

[57] The appellant was consequently sentenced to the prescribed minimum sentence of 15 years' imprisonment on each of the charges in terms of Act 105 of 1997. The court ordered that 5 years of the sentence on count one were to run concurrently with the sentence on count 2, which meant that the appellant would serve an effective sentence of 25 years imprisonment.

[58] I am not, however, satisfied that the State had led sufficient evidence to prove that the value of the dependence producing substances in respect of both counts, is more than R50 000,00, in which case the prescribed minimum sentence of 15 years' imprisonment would not apply. The only evidence that was placed on record was that of Cockrill, which evidence in my view was not sufficient for a court to conclude that the value of the drugs was more than R50 000,00. The State has conceded that much in respect of count 1.

[59] Cockrill testified about the so-called street value of these drugs. His evidence was that methamphetamine (Tik), cocaine and heroin is usually sold at R300,00 per gram. Then he further testified that the drugs as mentioned in the Charge Sheet, weighing almost 2 kilograms, would have a value of about R600 000,00. His further evidence was that the value of crack cocaine is sometimes much higher. This evidence in my view falls far short of what is expected by a court in determining the value of drugs with a view to deciding whether the minimum sentence would be applicable. In my view, such evidence should be meticulously placed before court during the presentation of the State's

case.

[60] In *S v Sithole 2005(2) SACR 504 (SCA)* at *page 509 paragraph (12) Cameron JA* held:

> *"For a minimum sentence to apply to an individual drug dealer acting alone who is not a law enforcement officer, the contraband must exceed R50 000 in 'value'. The Legislature specified a monetary figure, and not a weight, presumably because illegal drugs vary so greatly in value. A car-load of dagga may be worth less than a small packet of heroin or cocaine. But this entails that the State must prove the value of the contraband seized - a more exacting task than proving its weight. And it must prove value not by showing a notional or abstract or potential value, but the value of the drugs to the dealer, whether at the place of seizure, or at the dealer's intended point of sale. This has particular practical relevance when drugs in large volume are seized."*

[61] In *S v Legoa 2003 (1) SACR 13 (SCA)* at *para's [10] – [12],* it was held that "*value*" in the minimum sentencing legislation means "*market value*". To determine such value, a court being asked to apply the minimum sentence should establish what could be obtained for the thing in question.

[62] It is my view that the evidence presented to the court *a quo* was not strong enough for a court to find beyond reasonable doubt that the value of the drugs exceeded R50 000,00 in respect of the second charge. I am therefore of the view that in the absence of sufficient evidence to prove this fact, the Regional Magistrate misdirected himself when he imposed the prescribed sentence of 15 years' imprisonment on each count. I do not think it is therefore necessary for this court to deal with the other issues raised by Mr King as to why this court should interfere with the sentence. This court is therefore at large to impose a sentence afresh. In my view, this sentence should be as prescribed in terms of Section

17(e) read with Section 13 (f) and Section 5(b) of Act 140 of 1992. The penalty for dealing is imprisonment for a period not exceeding 25 years or to both such imprisonment and such fine as the court may deem fit to impose.

AN APPROPRIATE SENTENCE

[63] In considering an appropriate sentence the court has to have regard to the personal circumstances of the appellant, the offence he had committed and the interests of society.

THE PERSONAL CIRCUMSTANCES OF THE APPELLANT

[64] The appellant was a first offender. He is married and it seems he is a father of 2 children. He was 42 years old at the time of his sentence. He came to South Africa from Nigeria in 1999. He married a South African woman with whom he has been living at the time of sentence for 12 – 13 years. They have 4 children. They were 11 years, 7 years, 2 years and 18 months at the time of his sentencing. He lived with his wife up to the time of his arrest in a house in Milnerton. He had two businesses he was involved with up to the point of his arrest. One was a cell phone shop and the other was a clothing business. During the commission of this offence, the accused was a first offender although he was subsequently arrested and convicted on a similar matter. It is clear that a sentence of direct imprisonment will have a negative effect not only on him but also his family life, especially a sentence of long term imprisonment. He is currently serving a term of imprisonment of 10 years for a similar offence committed after his arrest on this

case.

THE OFFENCE

[65] This offence which the appellant had been convicted of can no doubt be regarded as serious. Although, the evidence does not clearly indicate what the market value of the drugs was, a considerable amount of drugs were found in possession of the appellant for the purposes of dealing. This evidence clearly shows that the appellant was unashamedly involved in drug dealing.

[66] Unscrupulous drug dealers like the appellant prey on unsuspecting and innocent drug users who later become addicts. These addicts terrorise our society by committing crime to satisfy their drug needs. This is a reality of the drug-ridden society we live in. The appellant was brazen in his conduct and showed no remorse for his actions. It was only right that the legislature has ordained that certain prescribed sentences apply if it can be proved that a case falls within certain categories.

[67] The police and authorities have extreme difficulty in curbing this type of offence. It seldom if ever happens that the real dealers like the appellant are brought to justice. They usually make use of intermediaries or couriers to do their dirty work for them and usually reap the benefits and profits at the expense of people who work for them.

INTERESTS OF SOCIETY

[68] No judicial officer, especially in this Province, 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 like the appellant 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. In the result therefore the only appropriate sentence this court can impose is one of direct imprisonment.

[69] In the result therefore, I make the following order:

1. The appeal against conviction on both charges are dismissed;

2. The sentence imposed by the Regional Court in respect of both counts is set aside;

3. The sentence is replaced with the following:

    a) In respect of count 1 the appellant is sentenced to seven (7) years imprisonment;

    b) In respect of count 2, the appellant is sentenced to fifteen (15) years' imprisonment.

The court orders that the sentence imposed on count 1 runs concurrently with the sentence imposed on count 2.

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**HENNEY, J**

Judge of the High Court

I agree, it is so ordered.

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**BAARTMAN, J**

Judge of the High Court