IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Review Case No. 19113

In the matter between

THE STATE

and

ZAYNE CRONJE

Date: 3 October 2019

JUDGMENT ON REVIEW

BOQWANA J and THULARE AJ

[1] The proceedings in this matter were considered on review in terms of section 304 and Boqwana J had doubts as to whether the proceedings were in accordance with justice, with particular reference to the sentence imposed. The statement of the judicial officer who presided at the trial was obtained wherein he set forth his reasons for the sentence, and the matter lay for consideration.

[2] The accused appeared before the magistrate in Muizenberg in the district of Simon's Town and pleaded guilty to unlawful possession of seven (7) packets of Tik, a popular abused drug in the Western Cape, which contained methamphetamine which is listed in Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 as an undesirable dependence producing substance.

[3] The magistrate questioned him in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. The magistrate was satisfied that he is guilty of the offence and convicted him. The State proved four (4) previous convictions against the accused. Three of them were for the same offence for which the magistrate convicted him. On 7 December 2006 he paid an admission of guilt in an amount of R100-00. On 23 March 2011 he was fined R2000 or 4 months imprisonment wholly suspended for 5 years on condition that he was not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 committed during the period of suspension. On 16 July 2018 he was fined R500 or 10 days imprisonment. The other previous conviction was contravention of section 37(1)(a) of the General Law Amendment Act 62 of 1965 for receiving stolen goods and he was sentenced to 3 years imprisonment wholly suspended for 5 years on condition that the accused is not found guilty of theft or contravention of section 36 (1) of Act 62 of 1955 committed during the period of suspension.

[4] The accused was 28 years of age, unmarried and had a 7 year old child. His highest academic advancement was standard 2. He was unemployed. He resided at […] Street, Overcome Heights, with his father. He supported his child. The State argued for direct imprisonment as the only appropriate sentence. The accused was sentenced as follows:

> "R5000-00 (five thousand rand) or five months imprisonment. A further 10 (ten) months imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of contravention of section 4(b) or 5(b) of Act 140 of 1992 committed during the period of suspension."

[5] The magistrate was asked to comment on the proportionality of the fine *vis a vis* terms of imprisonment imposed, in the light of *S v Permall* 2018 (2) SACR 206 (WCC). It is not necessary to repeat the content of the response received from the magistrate, because of its length, save to deal with the salient features thereof.

[6] The magistrate in his response seems to, *inter alia*, raise an issue that *Permall* appears to take away the discretion of the magistrate in sentencing. The suggestion is that by referring to the mathematical formula, this court held that the computation ought to be rigidly applied in each case when the magistrate decides to impose a fine, thus losing the particular circumstances of an individual case. It is therefore important to deal with that issue.

[7] As a starting point it is important to refer to an established principle which was repeated in *S v Swarts* (181072) [2018] ZAWCHC (13 November 2018)] at para 6 that:

> " Sentencing entails the exercise of a discretion vested in a court which, like all discretionary powers, must be exercised judicially. Mocumie JA expressed herself as follows in Mhlongo, supra at para 3:
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> "… Especially in criminal matters where the liberty of a person is at stake, it must be exercised judiciously and in accordance with principles of fairness and justice."

[8] It is important to state upfront that, to the extent that *Permall* conveyed that a formula ought to be applied every time a judicial officer decides to impose a fine, that interpretation is not correct as it is not consonant with the cardinal principle established that the sentence must be individualised and must fit the particular accused, the nature of the crime and the interests of society. Although *Permall* did retain the residual discretion at para 12 of the judgment and emphasised that a judicial officer ought not to impose a sentence that is disproportionate. For purposes of clarity, where a fine would

be considered of which payment must be enforced by a term of imprisonment, such sentence of imprisonment for any period must be within the limits of the jurisdiction of the court or extended jurisdiction as prescribed by any law which would be applicable.

[9] It is perhaps important to emphasise that a uniform term of imprisonment as an alternative should not necessarily follow a particular fine that a magistrate has determined or *vice versa*, mechanically. A sentence to be imposed is within the discretion of the trial court.

[10] Although no formula should be followed, fines should be consistent so as to create certainty, depending on the circumstances of each offender, the seriousness of the crime and interests of society.

[11] It is established that the magistrate is not obliged to apply the ratio, and must consider all relevant factors in order to meet justice as the circumstances of the case dictates. When it comes to the relationship between a fine and a period of imprisonment, it is impossible to generalise. The particular and material facts and circumstances of the case are relevant considerations. We accordingly agree with the *dicta* set out in various cases, *S v Wana* 1990 (2) SA 877 at 879F-G; *S v Kapeng* 1992 (1) SACR 596 (O) at 600f-h and *S v Hayes* 2001 (1) SACR 545 (SE) at 546a-b.

[12] Proportionality is a key consideration in sentencing. Whilst the relationship between the fine and the period of imprisonment may be relevant for determination, regard must be had to the crime, the criminal and the interests of society.

[13] In this case, previous convictions of the accused weighed very heavily with the trial court and more specifically that there were only 38 days between the last day of his conviction and sentence and the offence for which the magistrate convicted him. We agree with the magistrate that the accused had previous convictions for similar offences and that previous sentences seem not to have deterred him. However labeling it a

"*continuous, lengthy, extensive and habitual criminal conduct*" may be an overstatement.

[14] The suspended sentence was imposed in 2011 and accused was next convicted in 2018 for a similar offence. It is not clear how the convictions on 16 July and 23 August 2018 respectively were found to relate to a deterrent sentence which "*hang like a figurative sword of Damocles*", when the 5 year term had ended in 2016.

[15] The continued possession of drugs in contravention of the legislation, the number of units found on the accused and the amount of money found on his person, could explain why he did not desist from possession of drugs. These are relevant factors in the evaluation of an appropriate sentence. A fine may not have had any effect on the accused in the past.

[16] The accused may have no assets; it can be assumed that the term of imprisonment would ultimately constitute the primary means of punishment imposed under the circumstances. This is fortified by the fact that it does not appear that the accused was informed of nor afforded an opportunity to pay a deferred fine.

[17] It would have therefore been appropriate for a probation officer's report to be procured, having regard to the circumstances of the accused and in particular an investigation into reasons for the continued drug possession. In view of the fact that the accused may have served most of his sentence, it may not be appropriate in this case to set aside the sentence and remit it for the purposes of the probation officer's report. It remains for the court to confirm the proceedings, particularly because the sentence does not appear to be shockingly inappropriate.

[18] The result is to confirm the proceedings as being in accordance with justice.

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NP BOQWANA

JUDGE OF THE HIGH COURT

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DM THULARE

ACTING JUDGE OF THE HIGH COURT