

SOUTH AFRICA / JUDGMENT

Haggis and Another v S

(A147/2013;30/97/1997) [2023] ZAWCHC 64; 2023 (2) SACR 24 (WCC) (17 March 2023)

[2023] ZAWCHC 64

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman, De Wet

CASE / FILE NUMBER

A147/2013;30/97/1997

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FLYNOTES:

FURTHER EVIDENCE ON APPEAL

CRIMINAL

– Appeal – Further evidence – Substantial delays in finalising trial – Further delays in reaching court on

appeal – New facts – Changed circumstances of illness and hardship of two appellants –

Material to outcome and in

interests of justice to be allowed – Exceptional circumstances for first appellant and sentence replaced with one

wholly suspended – Second appellant a pensioner but not incapacitated so imprisonment reduced.

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Reportable

Case

Number: A147/2013

Case

Number (Regional Court): 30/97/1997

In
the matter
between: ERROL
HAGGIS First
Appellant
PATRICK
DAINTREE Second
Appellant
and
THE
STATE Respondent
Before
the Honourable Ms Justice Baartman and
Ms
Acting Justice De Wet
Date
of Judgment: This judgment was handed down electronically by
circulation to the parties' legal representatives by email.
The
date and time for handing down judgment is deemed to be on 17 March
2023.

JUDGMENT

DE WET AJ:

[1] It is often said that justice delayed is justice denied.[1] The offences for which the appellants were convicted took place more than 26 years ago and it has been more than 15 years since they were sentenced. The delays pertaining to the finalisation of this matter highlights the systemic problems experienced in the legal system and how detrimental delays are to the proper administration of justice. Justice evaded is however not justice denied.

[2] In summary, and to give context to the magnitude of the delays in this particular matter, it appears from the record, which consists of more than 4000 pages, that the appellants (and accused 1 ("Abrahams"))

whose appeal this court dealt with during 2021 under the same case number) were both convicted on 1 November 2007 after a trial which took 11 years to be completed and both were sentenced on 24 January

2008. They both applied for leave to appeal against their convictions and sentences and were both granted leave to appeal against sentence only, on 24 January 2008. The second appellant (who was accused 3 in the court a quo) and his wife, accused 5, applied for special leave to appeal against their convictions during 2015 to the Supreme Court of Appeal and their belated application was refused on 9 November 2015. It then took another 5 years before the matter was finally ready, with certain technical difficulties in respect of the record which were condoned, to be placed on the roll on 26 November 2021. Prior to

the hearing and during October 2021, the state file a notice on the first and second appellants, to strike the appeal from the roll. On the date of the hearing, the first appellant was present in person and the second appellant was represented by an attorney from Legal Wize who had been appointed on 23 November 2021. The appellants requested a postponement which was granted and the court therefore dealt with and finalised the appeal of Abrahams only.

Relevant background information pertaining to the trial:

- [3] The charges brought against the appellants and 5 other accused, originated from a project launched by the Organised Crime Unit of the South African Police Services (“SAPS”) in regard to the trafficking of cannabis into the Western Cape, which investigation involved, inter alia, the activities of the second appellant who had previously been an informer to the SAPS and that of accused 7, who was a police officer at the time.
- [4] The evidence presented at the trial related to two consignments of cannabis that were confiscated in Beaufort-West. The first confiscation took place on 7 May 1996 and the second during 4 to 5 June 1996. The accused were all charged with contravention of s 5(b) of the Drug and Drug Trafficking Act, Act 140 of 1992 (“the Act”), and alternatives. The quantity of cannabis that was confiscated during these two incidents amounted to more than 330 kilograms.
- [5] The trial formally commenced in September 1999 and 8 years later the first appellant was convicted and sentenced to 6 years direct imprisonment of which 2 years were suspended for a period of 5 years on condition that he was not convicted of contravening s 5(b) of the Act during the period of suspension. The second appellant was

sentenced to 8 years direct imprisonment of which 2 years were suspended for a period of 5 years on condition that he was not convicted of contravening s 5(b) of the Act during the period of suspension. From the record of the proceedings a quo it appears that the main reasons for the delay in respect of the trial were changes in legal representation, long absences of accused 6, the death of accused 4 and delays in respect of the transcription of telephone records. Both appellants were on bail pending the finalisation of the trial and were again granted bail pending finalisation of their appeals against sentence.

The delay and the consequences thereof:

- [6] As a result of the delays in finalising the trial and thereafter to have the matter brought before this court, both the appellants launched an application for leave to submit further evidence on appeal. The general principle, as set out in *S v Marx*,^[2] is that on appeal, the only facts to be considered are those known at the time of the appeal. The general attitude of the courts over the years is a reluctance to re-open a trial, be it in respect of conviction or sentencing, on appeal. In *S v De Jager*^[3], the Appeal court formulated the factors which a court should consider in such an application as follows:

“They may be summarised as follows:

- (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a prima facie likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.

Ordinarily, in an appeal against sentence, only factors known to the court at the time of sentencing should be taken into account. But the rule is not invariable. Where there are exceptional or peculiar circumstances that occurred after sentence is imposed it is possible to take these factors into account and for a court on appeal to alter the sentence imposed originally where it is justified.”

- [7] Against this background I shall deal with the applications and appeals of the appellants separately, although many aspects overlap.

The case against the first appellant a quo:

- [8] The first appellant, who was a friend of Abrahams (a police officer), was requested by Abrahams to accompany him to collect a vehicle for the second appellant from the Eastern Cape during June 1996, to which he agreed.
- [9] They were arrested on their way back to Cape Town. Abrahams was the driver of the Nissan bakkie which transported a consignment of cannabis (19 bags) from the Eastern Cape to the Western Cape for distribution.
- [10] The second appellant and his wife, accused 5, made all the arrangements in respect of the collection and transportation of the cannabis with accused 7 (also a police officer at the time who was charged but reluctantly acquitted by the court a quo).
- [11] The first appellant pleaded not guilty and denied knowledge of the content of the freight. He further denied that he smelled any cannabis in the cabin of the bakkie and did not admit that the 19 bags found in the back of the bakkie contained cannabis. He admitted during the trial that he had lied in his warning statement wherein he had stated that he was on his way back to Cape Town from Aliwal-North and merely obtained “a lift” from accused 1 in the Nissan

bakkie. The court a quo, correctly so in my view, rejected his evidence and he was convicted as aforesaid.

- [12] For purposes of sentencing, the trial court accepted, by agreement between the state and the defence, a report in terms of 276(1)(h) of the Criminal Procedure Act 51 of 1977 (“CPA”), prepared by a probation officer. It is not in dispute that the court a quo carefully considered this report and the submissions made by counsel regarding the first appellant’s personal circumstances,

his role in the crime that was committed, the seriousness of the offence, the purpose of sentencing and the delay in the finalisation

of the trial.

New facts / changed circumstances of the first appellant:

[13] As a result of the delay as outlined above and the first appellant's changed personal circumstances, he sought leave to place the following new facts before the court on appeal:

13.1 He was in his late twenties when he committed the offence and is now 54 years old;

13.2 He married Ms Berenice Haggis about 7 years ago and they live in an informal settlement on the Cape Flats. They do not have children although they both have major children from their previous marriages;

13.3 The first appellant is unemployed whilst Ms Haggis is employed as a general worker. She is the breadwinner and they experience serious financial difficulties. According to the undisputed facts placed before the court, she barely earns enough to maintain them both;

13.4 The disability grant which the first appellant previously received has been stopped and he has applied for another grant.

13.5 The first appellant was previously employed for fifteen (15) years until 2019;

13.6 The first appellant suffered two strokes during 2020. According to medical reports obtained from Dr Swanepoel and Dr Van Jaarsveld, the first appellant suffers from uncontrolled hypertension, is currently being treated at the Bishop Lavis Day Hospital and is receiving medication;

13.6.1 his memory has been affected;

13.6.2 he is slow to use the bathroom and has frequent accidents with urinary incontinence and soils himself whereafter he is unable to clean himself, and in this regard he is totally dependent on Ms Haggis;

13.6.3 he needs assistance with daily tasks such as dressing, washing himself and grooming as a result of his cognitive impairment and decreased endurance; and

13.6.4 both Dr Swanepoel and Ms van Jaarsveld paints a bleak picture of the first appellant's health prospects and it is anticipated that his health will only deteriorate in future.

[14] Adv Geyer on behalf of the state did not oppose the application to place the new circumstances of the first appellant before the court that occurred and accepted his medical condition constitute exceptional circumstances that occurred after the sentence was imposed.

- [15] On the question as to whether the first appellant was responsible or in any way instrumental in the inordinate delay in the finalisation of the matter in an attempt to evade justice, it appears that, save for not actively pursuing the appeal against sentence and changing legal representation during the trial, there is nothing to indicate same.[4]
- [16] The new information the first appellant wishes to introduce is in my view material to the outcome of the appeal and it is in the interest of justice, particularly given the inordinate delay in the finalisation of the matter, that it be allowed.

The sentence and whether the court should interfere:

- [17] The circumstances under which a court of appeal would interfere with a sentence was aptly summarised in *S v Malgas*[5] by Marais JA as:

“Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”[6]

- [18] Adv Ruiters on behalf of the first appellant conceded that she cannot argue that the court a quo had misdirected itself in respect of the sentence in that the sentence provokes a sense of shock or is blemished with misdirection or irregularities.
- [19] The question is therefore whether the new evidence now before court, amounts to exceptional circumstances which justify the interference with the sentence imposed by the court a quo.
- [20] It appears to be generally accepted that where there is a delay (which cannot be ascribed to the appellant), it can in certain circumstances be accepted as exceptional and warrant an interference on appeal should the circumstance justify same. I was referred in this regard to the matter of *S v Grobler*[7] where there was a 13-year delay from the time the appellant was charged to the time the court sought to impose a custodial sentence. Due to new facts which were placed before the court, the sentence of 5 years direct imprisonment was set aside and the original correctional supervision sentence imposed by the Regional Court was confirmed. In the matter of *S v Michele*[8] the Court found that the appellants in that case had been obliged to wait for a period of six years without clarity as to their future and that it was a factor which the court can have regard to in the assessment of an appropriate sentence.

- [21] In *S v Roberts*[9] there was a three month delay. The court took into account that the appellant suffered mental anguish pending the hearing of the appeal and the court highlighted the need for appeals of this kind to be disposed of as quickly as possible.
- [22] In *S v Jaftha*[10] a period of ten years had elapsed after conviction and sentence before a warrant of arrest was issued. Miscommunication between the officials of the high court and the magistrate's court was the cause of the extraordinary delay. The appellant was granted leave to place new factors before the court on appeal and it was accepted that the delay was exceptional, and the sentence imposed was revisited.
- [23] In *S v Van Deventer*[11] eight years had elapsed between sentencing and hearing of the appeal. The court found that a delay of this nature was a serious reflection on the administration of justice and it was a significant factor which was taken into account in favour of the appellants.
- [24] In *S v Balfour*[12] the Supreme Court of Appeal took into account that a period of 7 years had passed since sentencing and the court accepted that new facts came to light after sentencing as a result of a delay and held:

“But seven years have passed since sentence was imposed, it would be unjust to consider sentence at this stage solely upon the information that was available to the trial judge. We were told from the bar and this was accepted by the State; that his wife has since died, leaving him to care for his teenage children aged between 10 and 15 years. He has also been promoted and has now risen to the rank of detective in the police force. These facts must be taken into account in considering what would be an appropriate sentence now to impose upon him.”

- [25] On the issue of the first appellant's medical conclusion, the court in *S v Mabutho*[13] set out the relevant considerations as follows:

“Thus, regarding her alleged illness I note the following: First, there is no application before us to lead any evidence concerning her health. Suffice to comment that the submission advanced before the court below was without any evidence or evidential foundation.

Secondly, depending upon the circumstances, a convicted person's health may sometimes afford a good reason for not sentencing him or her to imprisonment. In this regard see *S v Berliner* 1967

- (2) SA 193 (A) at 199F - G. There is certainly no rule that ill-health automatically relieves the criminal from being imprisoned. See also *S v Berliner*. Adequate medical hospital facilities are generally available for convicts. In this regard see *R v Milne and Erleigh*

(7) 1951

(1) SA 791 (A) at

879. Thirdly, the appellant in this case has failed to show any special circumstances regarding her health. There is no

justification to reduce her sentence. A reduction or suspension of a prison sentence on a mere excuse of ill-health would indeed attract criticism from the public and undermine societal confidence in our system of administration of justice. Fourthly, there must be demonstrable medical evidence indicating a convicted person's ill-health and the nature and treatment he or she requires. If treatment is needed the sentencing court is competent to direct correctional services to ensure provision of medical treatment.”

- [26] It was accepted by the state that the first appellant provided the court with demonstrable medical evidence of his ill-health and that the first appellant would suffer greatly should he be incarcerated at this stage. In fact, a custodial sentence, given his accepted inability to care for himself considered together with his memory loss, would amount to callous disregard of the first appellant's personal circumstances which, in my view, outweigh the public interest.
- [27] Further, and apart from the first appellant's changed personal and health circumstances and the delays in the matter being finalised, the first appellant was a first offender, albeit a serious offence which attracts direct imprisonment even for first offenders, his involvement in the offence was minimal and he did not receive any benefit for dealing. He further did not commit any further offence after he was charged in 1996.
- [28] I agree with Adv Ruiters that it is not necessary and impossible, given the health situation of the first appellant, to deal with the aspects of remorse and rehabilitation.
- [29] I am of the view that the first appellant has shown exceptional circumstances and that not to interfere, would lead to an injustice in the case of the first appellant. In the circumstances I propose that the first appellant's sentence should be set aside and replaced with a wholly suspended sentence.

The case against the second appellant a quo:

- [30] The second appellant was an informer to Sgt TF Smith (also known as Toffie Smith). The way they operated was that the second appellant would contact Smith as soon as he had to go and fetch a consignment of cannabis and that the transport and delivery of cannabis would be controlled. Smith would inform his superiors and the vehicle would be followed from the time it entered South Africa (from the Transkei (pre-1994) or Lesotho). The Narcotics Divisions of SAPS, along the road that the consignment would travel, would be informed that this is a controlled delivery in order to alert them not to stop the vehicle. The SAPS would then arrest the buyers of the cannabis as soon as the consignment had been delivered. At no stage was the second appellant allowed to initiate a delivery.
- [31] In March 1996 the second appellant was arrested in Tsolo with a consignment of cannabis. Smith, on instruction of his superior officers, then severed ties with the second appellant and he was no longer an informant of SAPS.

- [32] Smith was not aware of, nor involved in, the consignments which were stopped and confiscation in May 1996 or June 1996.
- [33] It was the second appellant's case in the court a quo that he had to travel to Tsolo to appear in court. He arranged with "Meisie" to use the red Nissan bakkie, for which he paid "Meisie". Accused 4, who has passed away, decided to buy cannabis while they were in Tsolo.
- [34] Accused 6 and another person travelled back to Cape Town in the Nissan bakkie with the cannabis. Accused 4, the second appellant and other persons travelled in a Jaguar which accompanied the bakkie. On 7 May 1996, in Beaufort-West, the bakkie was stopped and searched. The Jaguar was also later stopped. The Nissan bakkie contained 87 kgs of cannabis. The fingerprints of the second appellant were found on the Nissan bakkie.
- [35] Accused 6 was arrested for the possession of the cannabis after he made a confession. The second appellant requested that the Nissan bakkie be handed back to him and accused 7 released the bakkie into his possession.
- [36] In June 1996 the same Nissan bakkie was in the Eastern Cape to take building material there. A person called the second appellant and it was arranged that a consignment of cannabis would be brought to Cape Town. The second appellant obtained the services of accused 1 and the first appellant to drive the Nissan bakkie back to Cape Town, whilst the second appellant, his wife and accused 4 accompanied them in a Caprice motor vehicle. The bakkie was stopped in Beaufort-West and 247 kgs of cannabis was found in 19 plastic bags.
- [37] The second appellant pleaded not guilty and maintained his innocence until the application to admit new facts on appeal was filed.
- [38] The court a quo during the sentencing proceedings accepted, by agreement between the state and the defence, a report in terms of 276(1)(h) of the CPA, prepared by a probation officer. As with the first appellant, it is not in dispute that the court a quo carefully considered this report and the submissions made by his counsel regarding the second appellant's personal circumstances, his role in the crime that was committed, the seriousness of the offence, the purpose of sentencing and the delay in the finalisation of the trial.
- [39] The court a quo found, correctly so in my view, that the second appellant was the "groot kokkedoor"[14] who had used his connections within SAPS to deal in drugs and had no qualms in drawing other individuals, such as accused 1 and the first appellant, who was clearly not innocent, into his activities. The court found him to be a dishonest witness who showed no remorse. He was thus convicted and sentenced as set out above.

New facts / changed circumstance of the second appellant:

- [40] The second appellant launched an application for condonation for the late filing of the heads of argument and for leave to place new facts before the court during April 2022.

[41] In his affidavit, the second appellant mainly relies on the delay in the finalisation of the matter and his personal circumstances, and states that:

41.1 At the time of committing the offences he was 40 years old and he is now a 65 year old pensioner;

41.2 The trial took 11 years to be finalised. The delay was as a result of accused number 6 absconding for an extended period of time, some of the accused, including himself, changing legal representation and accused 4 who became ill and later died;

41.3 The delay in the prosecution on the appeal was as a result of the court delaying the finalisation of the appeal record as it was only filed on 26 April 2013 (5 years after obtaining leave to appeal against sentence) and then it was still not in compliance with the rules of court;

41.4 During March 2020 the Covid 19 pandemic struck South Africa and the second appellant's wife, accused number 5, who he was married to for 37 years, passed away. The matter was placed on the roll again on 26 November 2021 and the second appellant approached Legal Wize for assistance.

41.5 that the delay of 11 years for the trial to be finalised had a psychological impact on his mental well-being and he was under the constant fear of being incarcerated for an inordinate period.

41.6 he had previous convictions but his last one, prior to these charges, was in 1991. He has since his arrest, 27 years ago and whilst out on bail, not been charged or involved in any criminal activities.

41.7 He is unemployed, a pensioner, a widower and suffers from diabetes, high blood pressure and arthritis.

41.8 He has now "had a lot of time to think about his conviction and sentence" and realises that he is the only one responsible for the "mess" he finds himself in. He states he is truly sorry for his actions and apologise to all parties that were affected which includes the community, the state and his family.

[42] It appears from the affidavit filed by Ms van Graan of Parker Attorneys, that she only received an instruction from Legal Wize on 23 November 2021. The second appellant clearly only approached Legal Wize after the state had filed an application to strike the appeal from the roll during October 2021. The delay in filing the second appellant's heads of argument is in my view sufficiently explained by Ms van Graan and is condoned. So is the late filing of the application.

- [43] On the question as to whether to allow the new facts in the case of the second appellant, I have already dealt extensively with the approach of the courts in matters where there has been an excessive delay. This is such a matter and on this basis alone it would, in my view, be in the interest of justice to allow the new facts or changed circumstance in order to consider whether an interference in the sentence of the second appellant would be justified.
- [44] Adv Garces on behalf of the second appellant conceded that he cannot argue that the court a quo had misdirected itself in respect of the sentence in that the sentence provokes a sense of shock or is blemished with misdirection or irregularities.
- [45] The question is therefore, as in the case of the first appellant, whether the new evidence, now before court, amounts to exceptional circumstances which justify interference with the sentence imposed by the court a quo. This question involves a careful analysis of the reasons for the delay, after the trial had been concluded, which the second appellant paid scant attention to in his application and appeal.
- [46] I will first deal with the issue of the reasons for the delay with specific reference to the conduct of the second appellant given the principle that it is ultimately the duty and responsibility of an appellant to place a complete and proper record before the court on appeal. Apart from changing legal representatives during the trial, it does not appear that the second appellant was the main reason or directly responsible for the inordinate time it took to finalise the trial. After sentencing and obtaining leave to appeal against sentence only, it appears that the appeal record was only filed with the registrar of this court during April 2013[15] and that the appeal was then first placed on the roll for hearing in November 2014, but postponed by agreement between the parties for the outcome of the second appellant's petition which was lodged during 2013. The petition was dismissed on 19 February 2015 and the appeal was set down for hearing on 30 October 2015. The second appellant and his wife then lodged an application for special leave to appeal to the Supreme Court of Appeal and as a result thereof the appeal was postponed sine die.
- [47] The second appellant and his wife's application for special leave to appeal was dismissed in November 2015 and thereafter he did absolutely nothing further in this appeal on his own version. Had it not been for the efforts of the legal representatives of Abrahams and the state, the appeal would probably still have been pending.
- [48] When the pending appeal was brought to the attention of the Judge President by the legal representatives of Abrahams and the state during 2019, Mr Weeber, who was still acting for the second appellant and his wife, indicated that he was not able to make contact with his clients and that they did not respond to his enquiries. He then withdrew during April 2019.
- [49] A notice was served on the second appellant and his wife, to file heads of argument on or before 3 April 2020 on 14 November 2019. The second appellant requested legal assistance and was referred to Legal Aid but did not proceed with an application. The Covid pandemic struck, and no further steps were taken until 2021.

[50] The appeal was set down again with the leave of the Judge President on 26 November 2021. A new notice was served on the second appellant to file heads of argument in the appeal on or before 28 May 2021. No reply was received.

[51] During October 2021 the state filed and served a notice of its intention to strike the appeal from the roll and a further notice was filed on the second appellant to file heads of argument on or before 28 September

2021. Again, no response was received.

[52] Upon the request of the court, the notice to strike the appeal was again served on the second respondent (at the same address that all the other notices had been delivered to) by the SAPS on 18 November 2021.

[53] The second appellant obtained legal representation prior to the hearing on 26 November 2021, the appeal was postponed and the application for leave to place new facts before the court and heads of argument were eventually filed during April 2022.

[54] It is trite that litigants who causes a delay cannot benefit from their own tardiness. In the matter of *S v EB*[16] at 529, it was held that: “The more liberal approach by this court, shown by a comparison of the decision in *Verster* (where the court refused to take into

consideration a delay in the hearing of an appeal as a reason for altering a sentence imposed by a magistrate) and the decision in *Michele* (where such evidence was taken into account and the sentence reduce), must not be interpreted as a willingness to open the floodgates. In cases such as the present, where the facts and circumstances arose after sentence, the application must be carefully

scrutinise to ascertain whether it does indeed disclose exceptional or peculiar circumstances. It is understandable to attempt the define these concepts further.”

[55] The second appellant and his wife’s conduct over the years had most definitely contributed to the delay. He persisted with his claims of innocence’s despite over-whelming evidence against him, he filed a belated application to the SCA which was dismissed, he did not provide his previous attorney with instructions when the appeal, due to no efforts made on his behalf, was finally before court and only instructed Legal Wize when faced with a notice that his appeal would be struck from the roll.

[56] In the matter of *Arendse v Magistrate, Wynberg and Others*[17] the Court

remarked as follows:

“In my view, however, a person in the position of the applicant who for some reason does not receive a notice calling upon him to serve his sentence cannot simply close his or her eyes to this omission and proceed to blithely ignore the sentence hanging over his or her head as if it did not exist. At some point, depending upon the circumstances, such a person is under an obligation to make reasonable inquiries as to what has transpired in his or her appeal. At the very least, in the absence of making such an inquiry/ies such a person cannot lay claim to some advantage of some relief at a later stage and thereby

seek to benefit from his or her own wilful neglect or passivity”

[57] In the matter of S v Malgas and Others[18] the Court described the attitude of the appellants in that matter as follows:

“The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar. In the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the Appellants do not enjoy a nightjar’s camouflage. They may have hidden but they have not been invisible”

[58] As with Abrahams and the first appellant, I have no doubt that had it not been for the inordinately delay, there would have been no reason for this court to interfere with the sentence imposed by the court a quo. Whilst it does appear that the omission by the second appellant to take the appeal further contributed to the delay in the finalisation of the matter, I cannot find on the facts before the court that the second appellant was solely responsible for the delayed process. No doubt the second appellant had hoped that the delay in the finalisation of the matter would result in him not facing the consequences of his actions. The wheels of justice, albeit sometimes excruciatingly slowly, still turn and ensure that the interests of society are served.

[59] Apart from the delay and the reasons therefore, it is common cause that the penalty provision for a contravention of s 5(b) of the Act, is a period of imprisonment not exceeding 25 years, or both such imprisonment and such fine as the court may deem fit.[19] In terms of the Criminal Law Amendment Act 105 of 1997 (“CLAA”), which only came into operation after the appellants were charged, a minimum sentence of 15 years imprisonment is prescribed for the offence of which the second appellant was found guilty, even in the case of a first offender. The penalty provision emphasises the seriousness with which our legislature still views these of offences.

[60] During the sentencing procedure, the court a quo referred to the matter of S v Mlambo[20] which dealt with the meaning of the sentencing provision contained in s 17(e) of the Act. The court, in that judgment, stated that the legislature intended that dealing in drugs should be dealt with more severely than the possession thereof and that is still the position today.

[61] In S v Xabadiya[21] the accused were convicted in terms of s 5(b) of the Act of dealing in 387,2 kgs of cannabis during 2008 and sentenced to 7 years imprisonment. On appeal the court held that the quantity of the cannabis must be taken into account in considering what an appropriate sentence should be.

[62] In S v Legoa[22] the accused, a 25-year-old man, was in terms of s 5(b) of the Act, convicted after he was arrested at a roadblock with 216,3 kgs of cannabis stashed in the car he was driving in, On appeal, his sentence was reduced to 5 years imprisonment. In S v Sithole[23] the accused was arrested at a roadblock and had 8 bags containing 160 kgs of cannabis. He was sentenced to 4 years imprisonment on appeal.

[63] From the aforesaid it is obvious that a sentence of direct imprisonment was, and still is, an appropriate sentence for the serious offence of dealing in illegal substances.

[64] On the issue of the second appellant's relatively old age and ill-health, nothing much was placed before the court to justify an interference with the sentence imposed by the court a quo. The illnesses complained about is common placed, can be and is treated

through the use of medication. In the matter of *S v Berliner*[24], where medical evidence was presented that the accused, who was 61 years old at the time, had a serious heart condition which influenced

his life expectancy, the court made the following comments which hold true in respect of the second appellant:

"While a convicted person's health may, depending upon the circumstances, sometimes afford a good reason for not sentencing him to imprisonment, there is certainly no general rule that ill-health automatically relieves a criminal from being imprisoned: medical and hospital facilities are, of course available for convicts".[25]

[65] In my view, the second appellant's health issues do not constitute any grounds for this court to interfere with his sentence as, unlike the first appellant, he is not incapacitated. However, as in the matter of *S v Manyaka*[26], I accept that the severely inordinate delay in the finalisation of this matter has been hanging like a proverbial sword over the second appellant's head and that it must have caused him some mental anguish.

[66] Whilst it is undoubtedly so that in the case of the second appellant, a sentence of direct imprisonment will probably serve little, if any, rehabilitative purpose, the public interest as expressed in the relevant statutory provisions and morals of society, in regard to the offence, in the present circumstances, demand direct imprisonment.

[67] I do however, in view of the extreme delay in the finalisation of the matter, which cannot be ascribed solely to the second appellant, and in light of his relatively old age, the loss of his wife and the fact that he has not been in conflict with the law since his arrest in this matter, find that exceptional circumstances exist to justify a reduction of his sentence.

[68] In the circumstances I propose the following order:

1. The first appellant's application to place new facts before the court is granted;
2. The first appellant's appeal against sentence is upheld and the sentence of the court a quo is set aside and replaced by the following order:

"5 years' imprisonment wholly suspended for 5 years on condition that the appellant is not again convicted of a contravention of section 5 (b) of the Drugs and Drug Trafficking Act, 140 of 1992 committed during the period of suspension".

3. The second appellant's application to place new facts before the court is granted;

4. The second appellant's appeal against sentence is upheld and the sentence of the court a quo is set aside and replaced by the following order:

"8 years' imprisonment of which 5 years are suspended for 5 years on condition that the appellant is not again convicted of a contravention of section 5 (b) of the Drugs and Drug Trafficking Act, 140 of 1992 committed during the period of suspension".

De Wet AJ

Acting Judge of the High Court

I agree and it is so ordered.

Baartman J

Judge of High Court

On behalf of the 1st Appellant: Adv Theresa Ruiters, Tel: (021) 424-5256 Email: theresaruiters@capebar.co.za On behalf of the 2nd Appellant: Adv M Garces, Cell: 082 894 9261 Email: michaelgarces@advchambers.com / Michaelgarces21@gmail.com Instructed by: Parker Attorneys, Tel/Cell: 082 519 9950 / Parker Attorneys, Tel/Cell: 082 519 9950 / (021) 423-7860 Ref: R Cloete Email: regan@parker-attorneys.com On behalf of the Respondent: Adv F Geyser - DPP, Cell: 084 821 2772 Adv F Geyser - DPP, Cell: 084 821 2772

[1] Although there appears to be some conflicting accounts of who first noted this phrase, it is commonly accepted that it was William E Gladstone during 1868.

[2] 1992

(2) SACR 567 (A) at 573 and also see *State v Karolia* 2006 (2) SACR 75 (SCA).

[3] 1965 (2) SALR 612

[4] In the judgment of Baartman J in respect of Abrahams, she dealt extensively with the affidavit deposed to

by Mr Tarentaal, a deputy director of the public prosecutions National Prosecuting Authority, wherein the reasons for the delay

are detailed and I do not repeat same herein.

[5] 2001

(2) SACR 1222 (SCA) at para 12.

- [6] Also see *S v Jaftha* where 2010(1) SACR 136 (SCA) held “Ordinarily, in an appeal against sentence, only factors known to the court at the time of sentencing should be taken into account. But the rule is not invariable. Where there are exceptional or peculiar circumstances that occurred after sentence is imposed it is possible to take these factors into account and for a court on appeal to alter the sentence imposed originally where it is justified.”
- [7] 2015
- (2) SACR 210 (SCA).
- [8] 2010(1) SACR 131 (SCA) para 13
- [9] 2000
- (2) SACR 522 (SCA) at page 529, para 22.
- [10] *Supra*.
- [11] 2012
- (2) SACR 263 WCC.
- [12] 2009
- (1) SACR 399 (SCA) at para 16, see also *S v Michele* 2010 (1) SACR 131 (SCA) at para 13.
- [13] 2005
- (1) SACR 485 (W).
- [14] Translated “mastermind”
- [15] Mr Weeber, who was appointed by the second appellant after sentencing, took steps on the second appellant’s behalf, to obtain the record of the proceedings a quo to further the appeal and in order to file a petition in this Court for leave to appeal against conviction.
- [16] 2010 (2) SACR 524 (SCA)
- [17] 2017(1) SACR 403 (WCC) at para 44
- [18] 2013 (2) SACR 343 (SCA) at para
- [19] Section 5(b) read with s 13(f) and s 17(e) of Act 140 of 1992.
- [20] 2007
- (1) SACR 664 (W).
- [21] 2017 JDR 1141 JDR.

[22] 2003

(1) SACR 13 (SCA)

[23] 2005

(2) SACR 504 (SCA)

[24] 1967 (2) SA 193 (A)

[25] In the matter of S v Mabutho 2006(1) SACR 485 (W) it was held in respect of ill-health that:
“The reduction or suspension of a prison sentence on a mere excuse of ill-health would indeed attract criticism from the public and undermine societal confidence in our system of administration of justice. Fourthly, there must be demonstrable medical evidence indicating a convicted person’s

ill-health and nature and treatment he or she requires. If treatment is needed the sentencing court is competent to direct correctional

services to secure provision of medical treatment.”

[26] 2022

(1) SACR 447 (SCA).

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