

SOUTH AFRICA / JUDGMENT

Jonga v S (CA&R295/2019) [2020] ZAECHGHC 23; 2020 (1) SACR 550 (ECG) (3 March 2020) [2020] ZAECHGHC 23

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, B M Pakati

CASE / FILE NUMBER

CA&R295/2019

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CA&R 295/2019

In the matter between:

NOKWALIWA JONGA Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

Bloem J.

- [1] The appellant was charged in the magistrate's court, East London with two counts of dealing in drugs, namely methaqualone (mandrax) in contravention of section 5(b) of the Drugs and Drug Trafficking Act[1] (the Drugs Act). The appellant was convicted on the strength of facts set out in a written statement which was handed to the magistrate in terms of section 112(2) of the Criminal Procedure Act.[2] The magistrate was satisfied that the appellant was guilty of the offences to which she had pleaded guilty. It appears that the two counts were treated as one for purposes of sentence. The magistrate sentenced the appellant to 15 years' imprisonment of which 5 years were suspended for 5 years on condition that the appellant not be convicted of contravening section 5(b) of the Drugs Act committed during the period of suspension. The appellant was accordingly sentenced to an effective term of 10 years' imprisonment. The magistrate granted the appellant leave to appeal against the above

sentence.

- [2] The facts upon which the appellant was convicted were that on 22 January 2019 and at her house in Sotho Location, East London she sold 10 mandrax tablets to an unknown person and on 29 January 2019 she again sold 10 mandrax tablets to the same unknown person who turned out to be an undercover police officer.
- [3] Sentencing falls ordinarily within the discretion of the trial court. Khampepe J dealt with the power of an appeal court to interfere with a sentence imposed by a lower court as follows in *S v Bogaards*:^[3]

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.” (authorities omitted)

- [4] In *S v Salzwedel and others*^[4] Mahomed CJ dealt with the same topic as follows:

“An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is ‘disturbingly inappropriate’, or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably. It has also been held that

‘(t)he over-emphasis of the effect of the appellant’s crimes, and the underestimation of the person of the appellant, constitutes ... a misdirection and in the result the sentence should be set aside’.” (authorities omitted)

- [5] Mr Geldenhuys, counsel for the appellant, submitted that the magistrate overemphasised the seriousness of the offences and underestimated the appellant’s personal circumstances and that the sentence was so severe that it induced a sense of shock. The state, represented by Mr Mtsila, did not support the sentence.
- [6] To determine whether or not an appropriate sentence has been imposed, one needs to determine whether the magistrate balanced the appellant’s personal circumstances with the offences that she committed and the interests of society. The appellant turned 60 during March 2019. Her unemployed adult son and her sister are dependent on her. She testified that prior to her arrest she sold drugs to make ends meet. After her arrest she stopped selling drugs and started selling milk from which she earned an income of about R200.00 per month. She has 2 previous convictions of theft having been committed during 1984 and 2002 respectively. She has also been convicted during February 2016 of the unlawful possession of dangerous or undesirable dependence-producing substance. She was sentenced to 12 months’ imprisonment which was wholly suspended for 5 years on condition that she not be convicted of a contravention of section 4(b) or 5(b) of the Drugs Act

committed during the period of suspension. In addition, she was sentenced to a fine of R600.00 or 36 days' imprisonment.

- [7] The circumstances under which the offences were committed were set out above. The offences are so serious that section 17(e) of the Drugs Act provides that a person who has been convicted of a contravention of section 5(b) thereof, shall be liable to imprisonment for a period not exceeding 25 years or to both such imprisonment and such fine as the court may deem fit to impose.
- [8] The magistrate had regard to the evidence of Raymond Buys of the Drugs Enforcement Unit of the South African Police Service. He testified about the prevalence of the sale of mandrax within and around East London. That was a relevant fact for the magistrate to take into account. The magistrate also took into account the evidence of Captain Buys that the appellant had previously been arrested for selling drugs but not convicted because charges were withdrawn because, for instance, a search of the appellant's premises was conducted without the relevant warrant. None of that evidence was put to the appellant when she testified. She was accordingly not afforded an opportunity to respond thereto. In any event, those alleged incidents had not been tested in any court or resulted in the appellant's conviction. It was under the circumstances unfair towards the appellant that Captain Buys' evidence in that regard was accepted by the magistrate.
- [9] The appellant was assessed to determine whether she was a possible candidate to be sentenced to correctional supervision. The officer who assessed the appellant compiled a report wherein she expressed the view that the appellant was a suitable candidate for correctional supervision. The magistrate did not place much reliance on the officer's report, which was handed in by agreement as evidence. In the report, the officer stated that one Ms Nokwalina alleged that the appellant is respectful towards her family and the elderly in her neighbourhood. The magistrate doubted that the appellant had such respect because firstly, members of the community reported her unlawful conduct to the police and accordingly did not agree with her unlawful activities; and secondly, a person with respect for elders would not sell drugs to their children and grandchildren. In my view that criticism is fair, but the officer was not given an opportunity to defend the contents of her report which, as pointed out above, was admitted as evidence without challenge. The magistrate did not deem correctional supervision as an appropriate sentence because of the seriousness of the offences and the consequences of the sale of mandrax.
- [10] In my view there is merit in the submission made by Mr Geldenhuys that the sentence imposed by the magistrate was shockingly severe. This court can and must accordingly interfere by setting aside the sentence and imposing what it deems to be an appropriate sentence. In this regard I have considered the authorities which I deal with hereunder as a guide to determine an appropriate sentence.
- [11] In *S v Masike*[5] a 53-year-old man and his co-accused were convicted in the magistrate's court of dealing in 184 tablets of mandrax.

Each was sentenced to 8 years' imprisonment, of which 2 years were conditionally suspended for 5 years. Their appeal to the High Court against their convictions and sentences was unsuccessful. They appealed to the then Appellate Division

which found that the magistrate had misdirected himself when he found that the evidence established the existence of a well-oiled

organisation which distributed drugs on a wholesale basis and possibly even at a retail level, and making the assumption that the

appellant was involved in that organisation, when there was no evidence to support that finding or assumption. The appeal

court considered the imposition of a proper sentence afresh because of the misdirection on the part of the magistrate. Van Heerden JA took into account, as aggravating circumstances, the fact that the appellant had been convicted of a serious offence and that he had "a bad record reflecting criminal propensity" and, as mitigating circumstances, the number of tablets involved, finding in that regard that 184 tablets did not afford any indication of a large scale distribution of mandrax and that the appellant played a minor part in the sale of the tablets. The court expressed serious doubt whether, in the above circumstances, a long term of imprisonment would serve any of the sentencing

objectives, i.e. deterrence, retribution and reformation. The sentence was set aside and replaced with a sentence of 4 years'

imprisonment of which 2 years were conditionally suspended.

[12] In *S v Ndaba*[6] a 30-year-old first offender was convicted in the magistrate's court of dealing in mandrax because she sold 500 mandrax tablets to a police trap. She was sentenced to 7 years' imprisonment, of which 2 years were conditionally suspended for 5 years. Her appeal to the High Court against her sentence was unsuccessful. She also appealed to the Supreme Court of Appeal which reiterated that the sale of mandrax is a serious offence but that the sentence imposed by the magistrate was excessive. The sentence was accordingly set aside and replaced with a sentence of 5 years' imprisonment of which 2½ years were conditionally suspended for 3 years.

[13] In terms of section 17(e) of the Drugs Act a term of imprisonment must be imposed on an accused person who has been convicted of dealing in drugs in contravention of section 5(b) thereof. The court can suspend that sentence of imprisonment.[7] In view of the appellant's impecunious situation which is unlikely to improve, her age, the quantity of the mandrax, that she co-operated with the police almost immediately after her arrest, that she pleaded guilty, I am of the view that the interests of society do not demand that the appellant spend any time in prison. A more effective sentence under the circumstances would be to suspend the term of imprisonment. Such a sentence would have the effect of keeping the appellant out of prison but at the same time with a sword hanging over her head for the entire period of the suspended term of imprisonment. In all the circumstances an appropriate sentence

would, in my view, be imprisonment for 5 years wholly suspended for 3 years on the condition set out below.

[14] In the result it is ordered:

14.1. The appeal against sentence is upheld.

14.2. The sentence of 15 years' imprisonment of which 5 years were suspended for 5 years imposed on the appellant on each count is set aside and replaced with the following:

"1. On count 1 the accused is sentenced to 5 years' imprisonment.

2. On count 2 the accused is sentenced to 5 years' imprisonment.

3. The sentences imposed on counts 1 and 2 are to run concurrently.

4. The sentences imposed on counts 1 and 2 are wholly suspended for 3

years on condition that the accused not be convicted of contravening section 4(b) or 5(b) of the Drugs and Drugs Trafficking Act, 1992 (Act No. 140 of 1992) committed during the period of suspension, and in respect of which the accused is not sentenced to direct imprisonment of at least 3 months.

5. The drugs are forfeited to the state."

14.3. The sentences are antedated to 13 June 2019.

G H BLOEM

Judge of the High Court

PAKATI J,

I agree.

B M PAKATI

For the appellant: Mr

D P Geldenhuys of the Justice Centre, Grahamstown.

For the state: Mr

S S Mtsila of the office of the Director of Public Prosecutions, Grahamstown.

Date heard: 29

January 2020

Date of delivery of the judgment: 3

March 2020.

[1] Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992).

[2] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[3] S v Bogaards

[2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) at para 41.

[4] S v Salzwedel and others 2000 (1) SA 786 (SCA) at 790D-E.

[5] S v Masike 1992 (1) SACR 667 (A).

[6] S v Ndaba 1993 (2) SACR 633 (A).

[7] S v Ramone 2013 (2) SACR 596 (FB) at para 7.

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