

SOUTH AFRICA / JUDGMENT

Muller v S (CA&R59/19; CA&R57/19) [2020] ZANCHC 90; 2022 (2) SACR 106 (NCK) (10 December 2020)

[2020] ZANCHC 90

COURT

Northern Cape High Court, Kimberley

BEFORE

Tlaletsi, Phatshoane

CASE / FILE NUMBER

CA&R59/19; CA&R57/19

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Date heard: 12/10/2020

Date delivered: 10/12/2020

NOT REPORTABLE

In the matters between: -

IN CASE NUMBER: CA&R 59/19

GERRIT GERHARDUS MULLER APPELLANT

versus

THE STATE RESPONDENT

IN CASE NUMBER: CA&R 57/19

PETRUS GELANT APPELLANT

IN CASE NUMBER: CA&R 59/19

CLINTON KASTOOR APPELLANT

Coram: Tlaletsi JP and Phatshoane ADJP

JUDGMENT

Tlaletsi JP

- [1] This judgment relates to three appeals against sentence heard on the same day in this court. In the court a quo the three cases were heard separately on 24 January 2019 by Ms Muller, the district court magistrate sitting in Calvinia. It made sense that the appeals be heard by one appellate panel since the circumstances of each case are substantially the same and are linked. With this approach, some measure of consistency is guaranteed.
- [2] The appellant in the first appeal is Gerrit Gerhardus Muller who was convicted on the basis of his plea of guilty to four counts of dealing in cannabis in contravention of s 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992 (the Drugs Act). On 25 April 2019 he was sentenced to two years' imprisonment on each count with the result that his effective term of imprisonment is eight years.
- [3] The appellant in the second appeal Petrus Gelant, appeared on 24 January 2019 before Mr Kemp, a magistrate in Calvinia, and pleaded guilty to six counts of dealing in cannabis. He was convicted on the strength of his plea of guilty. We understand that while the proceedings were pending, Mr Kemp was approached by members of the public regarding the case, resulting in his recusal from the case. The matter was in terms of s 275 of the Criminal Procedure Act, 51 of 1977 (the Act) taken over by Ms Muller to finalise the sentencing proceedings. On 25 April 2019 all the charges were taken together for purposes of the sentence and 13 years' direct imprisonment was imposed.
- [4] The appellant in the third appeal is Clinton Kastoor. He pleaded guilty on five counts of dealing in cannabis and was convicted as such. On 25 April 2019 he was sentenced to two years' imprisonment on each count with the result that he is to serve a term of 10 years' direct imprisonment.
- [5] For the sake of convenience and to avoid confusion the appellants shall henceforth be referred to according to their surnames. They were all legally represented in the court aquo.
- [6] All three appellants applied and were granted leave to appeal against their sentences by the magistrate on 30 July 2019. Two months later, on 25 September 2019, Muller applied to be released on bail pending this appeal. His application was refused. With this outcome the remaining appellants abandoned their efforts to apply to be released on bail pending their appeals. This has resulted in all the appellants serving their sentences from 24 April 2019 to date.
- [7] Before dealing with the merits of the appeals it is appropriate to raise our concern about the unwarranted delay in hearing the appeals. The appeals were set down for hearing in this Court on 11 November 2019 but were postponed to 24 February 2020 due to incomplete records that had been transmitted to this court. The clerk of the court, Calvinia, was ordered to see to the transcription of the missing parts of the records and to bind them to the appeal record; that in the event that the record cannot be transcribed, to see to the reconstruction of the missing parts. The presiding magistrate was directed to provide

reasons through the Registrar's Office why the incomplete record was dispatched to this Court.

- [8] On 16 January 2020 Mr Steynberg, counsel for Kastoor, wrote a lengthy letter to the clerk of the court Calvinia in which he explained in detail the expected role of the clerk of the court in preparing the record for the appeal. He also outlined the responsibility of the trial magistrate in ensuring that a proper and complete record is dispatched to the Registrar. He quoted extensively from the decision in *S v Mabena*[1] as guidance to the clerk of the court and the trial magistrate. He also attached the order of this Court dated 11 November 2019 and reiterated that the record that was subsequently provided to him was still incomplete and not sufficient for the proper reappraisal of the appeal. He correctly pointed out that the unwarranted delays are prejudicial to the appellants who are serving the sentences appealed against.
- [9] On or about 21 February 2020 the trial magistrate provided the Registrar with an affidavit in which she inter alia, stated that the procedure at her Court is that once she had granted leave to appeal the court manager and the clerk of the criminal court are responsible for arranging that the record is transcribed and to ensure that the transcript reaches the Registrar's office; that the order of 11 November 2019 was not handed to her by the clerk of the court and that it was only brought to her attention on 21 February 2020. She intimated having requested their senior clerk to immediately ensure that the missing parts of the transcript were sourced and forwarded to the Registrar's office.
- [10] What is missing from the magistrate's affidavit is the appreciation of the important and obligatory role a trial magistrate has to play in ensuring that a proper and complete record reaches the Registrar's office. Since it is the judgment of the magistrate which is the subject of the appeal, it remained her responsibility to ensure that a proper record of the proceedings was transmitted to the Registrar. She could not abdicate this task. In any event, it is expected of the trial magistrate to go through the record of her proceedings to ensure that it is free from unnecessary mistakes and is a true reflection of the proceedings before her. Doing so will ameliorate the problem of the records being sent back to the trial courts for corrections, a process which causes unwarranted delays. The systemic delays occasioned by the preparation and filing of the record are regretted. This is something that happens frequently with records from the district courts in this jurisdiction.[2] I now turn to the merits of the appeals.
- [11] These appeals emanate from an undercover police operation intended to identify and arrest suspects involved in illegal drug dealing in Calvinia and surrounding areas. The factual matrix supporting Muller's conviction are set out in a statement presented by his attorney in support of his plea. He was a friend to Gelant's sons where he frequently visited and assisted in his business of the sale of wood, fruits and vegetables. His girlfriend fell pregnant in
2016. He was unemployed and decided to participate in the sale of cannabis from Gelant's premises. The purpose was to raise some money to support his girlfriend and to prepare for the expected child. For his services Gelant paid him with a packet of cannabis. He sold the cannabis pack and raised an income of about R170-00.[3]

- [12] On count one, he was approached by a police agent through Kastoor on 12 October 2016. He sold 12,04 grams of cannabis and received R40-00. On 24 October 2016 he was approached by the same police agent who sold to him 13,83 grams of cannabis for an amount of R50-00. The same agent approached him twice on 25 October 2016 and sold to him 29,04 grams for R100-00 on the first occasion. On the second occasion he sold 13.45 grams of cannabis for an undisclosed amount of money. The total weight of the cannabis in the five counts is 158,48 grams.
- [13] Gelant admitted to have sold cannabis on six occasions to the police agent. In respect of the first count, on 11 October 2016, he sold 11,34 grams for R30-00. According to him, Muller handed over the cannabis to the police agent. On 12 October 2016 he sold 146,92 grams of cannabis to a police agent for R300-00. He mentioned that he waited with one Johannes Kok in his motor vehicle. Johannes Kok entered the police agent's motor vehicle and handed the cannabis over to him and returned with the money. He shared the money with Johannes Kok as the cannabis belonged to Johannes Kok and he only provided transport. On the third count he sold 451,86 grams of cannabis to the police agent on 14 October 2016 for an amount of R1000-00 with the assistance of Johannes Kok as on the previous occasion.
- [14] On the 4th count the same police agent telephoned him on 8 November 2016 to place an order for cannabis. He arranged to meet him in town. He travelled with Johannes Kok. The latter handed 279,73 grams of cannabis and received R500-00. They shared the money as the cannabis belonged to Johannes Kok and he only assisted with transport. On 9 November 2016, Gelant was again called by the police agent seeking to buy cannabis. They arranged to meet at a petrol filling station where he handed over 297,65 grams of cannabis for R500-00. On 21 November 2016 he was also called by the same police agent. They met at a Total filling station where he sold to him 362,34 grams of cannabis for an amount of R500-00. The total weight of the dagga sold by the appellant is 1,549 kg.
- [15] Kastoor's pleaded facts in his statement disclosed that he stayed at Gelant's residence. On 28 September 2016 he was approached by a man looking for Johannes Kok. He sought to purchase cannabis. Since Johannes Kok had nothing at that stage, Kastoor took him to a place where he kept his own cannabis and sold to him 63,53 grams for an undisclosed amount of money. On 10 October 2016 the same person who was ultimately identified as a police agent, approached Kastoor and purchased 65,96 grams of cannabis for an amount of R100-00.
- [16] On 7 November 2016 the same agent phoned Kastoor to purchase cannabis. They arranged that he should pick up Kastoor at Gelant's place and drove to a place where he kept his cannabis. He sold 6.25 grams for an amount of R25-00. The following day, on 8 November 2016, the agent purchased 15.10 grams of cannabis for an amount of R50-00 from Kastoor. On 21 November 2016 the police agent phoned again and offered to purchase cannabis. Kastoor sold to him 7.63 grams of cannabis for an undisclosed amount of money. The total weight of cannabis involved in the five transactions is 160,48 grams.

- [17] In all three cases the respondent presented the evidence of Ms Mana Magdalena Smit, a social worker employed by the Department of Social Development with 17 years' of experience. A document prepared by her was admitted in evidence by consent. She is involved in the Offender Diversion programme. Her work entails assessing children aged 11 to 17 years who are in conflict with the law in cases involving drugs in Calvinia and surrounding areas. The objective of their programme is to teach offenders on various types of drugs and the danger they pose to them.
- [18] Her evidence was in brief that 92% of children who have or are alleged to have committed crimes in Calvinia used cannabis, Mandrax and tik; that children who use cannabis have difficulty in concentrating at school and end up dropping out of school; that from April to December 2018, 54 children were assessed and 29 of them had committed drug related crimes, either of possession or dealing in cannabis. She highlighted the negative effect of drugs on children and the domino effect it has on their families.
- [19] The respondent presented an affidavit of Lieut. Col. J W Serfontein relating to crime statistics on drug related crimes in the Northern Cape and in particular Calvinia policing precinct. The report is based on "raw figures". According to the report drug related cases for the Calvinia policing precinct totalled 149 during the period April 2015 to March 2016, 186 during the period April 2016 to March 2017 and 229 for the period April 2017 to March 2018. The statistics were intended to convey to the court that drug related cases/incidents were on the increase for the period referred to. The type of drugs involved in these cases was not identified.
- [20] The grounds of appeal in all the appeals are substantially the same. It is contended that the trial court grossly overemphasised the seriousness of the offences and the interests of the community at the expense of the appellants' personal and mitigating circumstances; that the sentences imposed are shockingly harsh; that the trial court misdirected herself by relying heavily on the evidence by the social worker on the negative effect of drugs on children when no evidence was tendered to suggest that cannabis was sold to children by the appellants.
- [21] It is trite that sentencing is a matter that is ordinarily left to the discretion of the trial court. An appellate court may not interfere with the sentence imposed in the absence of jurisdictional factors entitling it to do so. In *S v Bogaards*[4] the Constitutional Court held:
- '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.'

The test was eloquently stated by the Marais JA in *S v Malgas*[5] as follows:

‘..... A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. 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”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.’

[22] In all three appeals the respondent ultimately conceded that the sentences imposed by the trial court are harsh. However, it was contended that direct term of imprisonment would still be the appropriate sentence to be imposed. The concession on the harshness of the sentences imposed is well founded.

[23] Despite the fact that the sentences imposed are harsh, there are other grounds justifying interference with the sentences imposed by the trial court. In all three appeals the trial court made reference to the appellants’ personal circumstances. However, the interest of the community of Calvinia appears to have played a far greater influence than the personal circumstances of the appellants in determining their sentence. The warning in *S v Mthethwa*[6] is relevant in this case:

‘.. With regard to the personal circumstances of the appellants, the following point should be made. It is one thing to recite the personal circumstances of an accused. It is another to fuse those circumstances in the consideration of sentence. Unfortunately, in the present case, like many emanating from the lower courts, personal circumstances of the appellants were simply recited without considering how they should impact on sentence. That amounts to paying lip service to this component of sentencing.’

[24] The trial court’s emphasis of the effect of drugs in the youth is also based on the evidence of the social worker and her own experience. She mentioned that not long ago a ten years old boy who appeared in her court was using Tik. The over-emphasis of the sale of cannabis to children is made in circumstances where this aspect was disputed by the appellants during the trial. The state did not tender any evidence to link the appellants with the supply of

cannabis to children.[7] Drawing an inference that the supply of cannabis to police agents will ultimately fall in the hands of children, and use that as a reason to punish the appellants by making an example of them to deter other would-be offenders, is not only unreasonable but unfair.

[25] It is significant to note that the last transactions of the sale of cannabis happened during November 2016 for Gelant and Kastoor and during October 2016 for Muller. They were however only arrested on 8 August 2017. There is no explanation from the respondent why it took ten months to apprehend the appellants. What is surprising is that they were only charged for transactions that are ten months old, with no fresh charges. If indeed the purpose of the police operation was to combat dealing in cannabis which would potentially reach children, it made no sense to allow the appellants to continue with their illegal activities for such a long time without police intervention. The inaction of the police defeated their noble intention of combatting the crime.

[26] The trial court was alive to the decision of the Constitutional Court in *Minister of Justice and Constitutional Development v Prince*[8] and sought to distinguish it by stating that it dealt with possession and cultivation of cannabis and that the cases before her concerned dealing in cannabis. Indeed, at paragraph [88] of the judgment the Constitutional Court held that:

‘Although the provisions that the order of the High Court invalidated included provisions that prohibit the purchase of cannabis, in its judgment the High Court did not anywhere advance reasons why those provisions could not be said to constitute a reasonable and justifiable limitation of the right to privacy. A purchaser of cannabis would be purchasing it from a dealer in cannabis. Therefore, if this court were to confirm the order declaring invalid provisions that prohibit the purchase of cannabis, it would, in effect, be sanctioning dealing in cannabis. This the court cannot do. Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy. I will, therefore, not confirm that part of the order of the High Court because we have no intention of decriminalising dealing in cannabis.’

[27] From the above passage it is made clear that dealing in cannabis in contravention of section 5(b) remains an offence and dealing is recognised as a serious problem in this country. I agree, dealers warrant punishment with a view to curb the serious problem of dealing in cannabis. However, the Constitutional Court declared that to the extent that the legislation prohibited possession and/or cultivation of cannabis by an adult in private or private place for his or her personal consumption in private is inconsistent with the right to privacy entrenched in s 14 of the Constitution of the Republic.

[28] In arriving at this conclusion, Zondo ACJ referred with approval to what Ngcobo J said in *Prince v President, Cape Law Society and Others*:[9]

‘[61] On the medical evidence on record there can be no question that uncontrolled consumption of cannabis, especially when it is consumed in large doses poses a risk of harm to the user. An exemption that will allow such consumption of cannabis would undermine the purpose of the

prohibition. However, on the medical evidence on record it is equally clear that there is a level of consumption that is safe in that it is unlikely to pose any risk of harm. The medical evidence on record is silent on what that level of consumption is. Nor is there any evidence suggesting that it would be impossible to regulate the consumption of cannabis by restricting its consumption to that safe level. All that the medical evidence on this record tells us is that the effects of cannabis are dose-related and cumulative and that while “prolonged heavy use or less frequent use of a more potent preparation are associated with many different problems”, “one joint of dagga or even a few joints” will not cause any harm. Without further information, it is not possible to say whether or not the religious use of cannabis can be allowed without undermining the prohibition.’

[29] With this declaration it is reasonable to infer or even conclude that there is recognition by the Constitutional Court that the lens through which the society historically viewed cannabis has now changed. Unlike before, cannabis can now be lawfully possessed by an adult in circumstances decreed by the Constitutional Court. This aspect therefore, should make cannabis distinguishable from other drugs which cannot be lawfully possessed. This is a factor, in my view, that should be relevant in the consideration of punishment, especially for small scale dealers. Although it is at this stage not clear how cannabis can lawfully be acquired or purchased for lawful purposes as the Constitutional Court has found, it is the responsibility of the legislature to determine the circumstances in which cannabis can lawfully be acquired by an adult for purposes of possession or cultivation in a private place for his or her personal consumption in private. This aspect may be part of the process for the determination of the quantity of cannabis that may be possessed for purposes outlined above as directed by the Constitutional Court in the Prince

judgment.

[30] In imposing sentence for dealing in drugs it has to be recognised inter alia, that drugs differ in shape and form and some are more detrimental than others. Their value is also different. Those drugs that are more detrimental to society, generally referred to as hard drugs, deserve harsher punishment.[10]

[31] The delay of ten months before arresting the appellants is a matter that deserves consideration. The only evidence on record suggests that had the appellants been arrested on the first or second occasion they would have faced fewer charges than is the case. Without any evidence of sale to other people, it appears they found reliable and risk free customers in the police agents used to trap them, to the extent that they developed a relationship to sell cannabis to them with some comfort. Had they been arrested after the first few transactions they would have reconsidered their position and possibly appreciated the risk in continuing with their unlawful activities once released on bail, as was the case. They were not given an opportunity to learn from their wrongs at an early stage. The only evidence on record also suggests that in all the instances, it was the police agents that

approached the appellants and offered to purchase cannabis from them. This view however, does not suggest that there were no cannabis

businesses already in place when the police commenced with their undercover operation.

[32] In *S v Xaba and another*[11] it was contended that for the police to allow the undercover police operation to go for too long served only to increase the quantity of cannabis that the accused could be proved to have dealt in and so unfairly increase her sentence. In rejecting the contention, the court reasoned that the police were concerned to crush what they believed to be a drug dealing syndicate and that an arrest after the first conveyance would simply have served to alert other miscreants (and particularly errant policemen) who it was believed might be caught in the net; that when an arrest is made at an early stage of an operation the risk is always there that an accused might fabricate some exculpatory excuse that the prosecution, for want of more extensive evidence, cannot counter. It is significant to note that in *Xaba* the continuation of the police operation resulted in substantial amounts of cannabis being found as well as the modus operandi of a huge syndicate of drug trafficking and the involvement of the law enforcement officers in the illicit trade. In addition, a number of bags of dagga that had been stolen from the police exhibit storeroom were discovered.

[33] However, in the cases under consideration, there is no evidence that continued police operation yielded any positive result other than the repeated purchase of cannabis from each appellant by a trap that was allocated to him. The lull of about ten months before the arrests, without new or recent charges related to the operation being added, distinguishes this case from *Xaba*.

[34] Having found that the trial court misdirected itself in the sentences imposed and also that the sentences imposed are harsh and disproportionate to the circumstances of the offences and the appellants' personal circumstances, the next question is whether the appeals should be referred back to the trial court for sentence afresh. I do not think that it would be appropriate to do so when there is sufficient information before us to consider sentences afresh. It would therefore serve no purpose to remit the matters back to the trial court.

[35] A comparison of sentences imposed by the courts for contravention of section 5(b) of the Drugs Act is necessary as guidance. The following instructive remarks by Conradie JA in *Xaba*[12] are apposite:

'.. Whilst not misdirecting himself in any way, a presiding officer may nevertheless err in translating the guilt of an accused into years in prison. In order to do so properly he [she] must be alive to the levels of punishment considered to be socially appropriate or desirable. How many years' incarceration a particular drug offence will bring an accused is something that has to be determined by a general and necessarily rough comparison of what the presiding officer has in mind with the sort of sentence that courts are at the time imposing for that kind of offence and the penalties prescribed by the lawgiver. He or she then makes the adjustments required by the special circumstances of the case, most prominent of which are the personal circumstances of

the accused: his record, his contrition and that kind of thing.’

[36] It is trite that cases may be similar but each offender is different and the circumstances of each crime will differ. Each case must be determined on its unique facts. Other sentences imposed merely provide guides to be taken into account together with other relevant factors in the exercise of the judicial discretion in sentencing[13].

[37] We were referred to *S v Umeh*[14] in which the appellant was found in possession of 49,23 grams of methamphetamine (tik) during a police operation conducted at a

shopping mall parking lot. He accompanied the police to his home where crack cocaine (no weight) and methamphetamine 1485,90 grams

individually packed were found. He was convicted of dealing in drugs and sentenced to 15 years imprisonment on each of the two counts he faced in terms of Section 51(2) of Act 105 of 1997. The trial court ordered that 5 years of the sentence in the first count were to run concurrently with the sentence in the second count resulting in an effective sentence of 25 years’ imprisonment. On appeal the sentences were substituted with 7 years and 15 years respectively. The two sentences were ordered to run concurrently. The case however is distinguishable from the facts and circumstances of these cases as it involved substantial amounts of hard drugs. Furthermore, the appellant did not plead guilty despite the overwhelming evidence against him.

[38] In *S v Jerome Bartlette*[15], decided in this court, the appellant was convicted of what Bosielo AJP described as being “in the serious business of dealing in and distributing quite a bewildering array of drugs which included 48 ecstasy tablets, 2 grams

of heroin, 9 LSD tablets, 1 full moon cocaine crystal, 2 halfmoon cocaine crystal, 1 quarter cocaine crystal, 3 grams of cocaine, 7 grams of heroin, 150 ecstasy tablets, 10 grams of heroin and another 10 grams of cocaine”. The total value of all the drugs amounted to R26 000-00. He was sentenced to imprisonment for a period of 12 years. The appeal

against sentence was dismissed. The spectrum of serious and hard drugs involved distinguishes Bartlette from the facts and circumstances of the cases at hand.

[39] In *S v Sifiso Radebe*[16] the appellant was convicted of dealing in 3,9 kg of cannabis on his plea of guilty. He had a previous conviction of possession of cannabis for which he was sentenced to a fine of R1000.00 or 14 months imprisonment suspended for a period of 5 years on certain conditions. The trial court sentenced him to 3 years imprisonment. On appeal his sentence was altered to 2 years imprisonment wholly suspended for 5 years on certain conditions.

[40] In *S v Musawenkosi Gwala*,[17] also decided in this division, the appellant was found guilty in the regional court on a charge of dealing in cannabis in that he was found in possession of 98 kg of cannabis. He was sentenced to direct imprisonment for a period of 6 years of which two years were suspended for a period of 5 years on certain conditions. After considering sentences imposed in previous judgments, the court on appeal set aside the

sentence imposed by the regional court and replaced it with a sentence of a fine of R10 000.00 or failing payment of such fine to undergo a period of 18 months imprisonment. The appellant was further sentenced to a further 18 months imprisonment which was entirely suspended for a period of 5 years on certain conditions.

- [41] In *S v Maphisa*[18] a 32 year old first offender was arrested in a police entrapment for dealing in 98 grams of cannabis. He was sentenced to 16 years direct imprisonment. On appeal the court found that no link had been established to support the allegation that the appellant was selling cannabis to children, a factor which played a major role in the determination of sentence by the trial court. The sentence of 16 years direct imprisonment was set aside and replaced with 1 year 3 months which was antedated to the date on which the trial court sentenced the appellant. The sentence imposed on appeal equated the period that the appellant had been in custody serving the original sentence. It would appear that the appellate court had no freedom of considering other sentencing options in the circumstances. In my view, the term of imprisonment imposed does not necessarily provide a useful trend as it was imposed solely because of the circumstances prevailing in the case. Of particular interest is that this matter was decided after the judgment of the Constitutional Court in *Prince* and no reference is made to it in the judgment.
- [42] The respondent referred us to *Arendse v Magistrate Wynberg and Others*[19] where the accused, a 51-year-old correctional officer in the employ of the Department of Correctional Services, with approximately 31 years of service was arrested for being found in possession of 2,109 kg of cannabis. He was tried with two co-accused for dealing in cannabis. He was convicted as charged. He was sentenced to 5 years imprisonment of which 2 years were conditionally suspended. The circumstances of *Arendse* are distinguishable as it involved a law enforcement officer who was caught in the process of smuggling cannabis into a correctional facility, which is aggravating.
- [43] With the above brief consideration of previous cases, it is apposite to consider the circumstances of the appellants.
- [44] Muller was at the time of sentencing a 26 years old first offender, unmarried but fully maintaining his two years old daughter who is living with her unemployed mother. He was employed at a local supermarket earning R5000-00 per month. He dealt in cannabis in order to address his financial problems. In particular, he had to provide for his partner who was expecting his daughter when he was unemployed. Although this is not good enough reason to deal in cannabis it shows how desperate he was at the time. In *S v Kruger*[20] the court held that being destitute is not a justification to commit an offence but it may be a mitigating factor when balancing the cumulative effect of the whole sentence.

- [45] Muller further mentioned that he pleaded guilty out of remorse and has since stopped selling cannabis. He was tempted to sell cannabis because of his involvement with Gelant. He disputed selling cannabis to children. The overall weight of the cannabis involved in his charges amounts to 67,36 grams.
- [46] Kastoor was 27 years old at the time of sentencing. Although unmarried he was living with his partner who was not working. He passed matric and obtained Grade E, D and C in security training certificates and a special qualification in cash-in-transit and armed response. He was employed as a security officer and contributing R500-00 towards his mother's care. His work demands of him to have a valid firearm licence. He has no previous convictions. He was part of a rugby club near Van Rhynsdorp and helping in training teenagers. He used the proceeds of dealing in cannabis to fund his qualifications as a security officer and cash-in-transit and armed response training. Once again this is no justification for dealing in cannabis, but it says much about his dire needs at the time. The overall weight of the cannabis involved in his charges amounted to 158,48 grams.
- [47] Galant was 49 years old. He was in a co-habitation relationship of over 30 years with the mother of his three children all of whom are partially dependent on him. He was a businessman providing substantially for his family. He also provided employment to eight people. He has a record of previous convictions, three of which involved cannabis. His last offence was in
1994. The total weight of the cannabis involved in his six charges is 1549 grams. In his case the trial court remarked that he was "the mafia type organizer of a large network of dealers". This remark is based on the information on the plea explanation of the other appellants in different matters negatively implicating Gelant. He was not confronted with this information to give him an opportunity to respond thereto. This is a material misdirection on the part of the trial court.
- [48] Section 280(1) of the Act makes it competent for a court to impose multiple sentences of imprisonment for several charges the accused is convicted of. However, unless the court orders otherwise, the periods of imprisonment imposed will be served successively. This may result in the court, particularly a lower court, imposing a sentence exceeding its penal jurisdiction. The cumulative effect of the sentences imposed may be too harsh and cause an injustice on the offender. Furthermore, the cumulative effect of the multiple sentences of imprisonment may also result in the sentence being disproportionate to the offences committed by the offender. To ameliorate the cumulative effect of multiple sentences, an order that sentences run concurrently in terms of s 280(2) of the Act will be of assistance. It has been found that failure to take into account the cumulative effect of the sentences imposed by the trial court is on its own a misdirection.[21] It is not apparent from the reasons for sentence that the trial court took this aspect into account.
- [49] In *S v Muller*[22] the Supreme Court of Appeal authoritatively held that:

‘When dealing with multiple offences, a sentencing court must have regard to the totality of the offender’s criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, “he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality’. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence’. (References omitted).

The same consideration should be afforded to the appellants in casu. It is not in the public interest for a potentially valuable human to be materially damaged by a long prison term. Such a sentence will be to destroy rather than reform Muller and Kastoor who are first offenders and not hardened criminals.

[50] Having considered all the factors outlined above I am of the view that the appellants should not be sentenced to lengthy terms of imprisonment. However, the seriousness of the offences should be reflected in the sentences to be imposed. Consideration of other sentencing options is out of question since the appellants have already started serving the sentences imposed by the trial court. The sentences we impose are therefore also influenced by the circumstances before us. We find it appropriate that the charges be taken together for purposes of sentence because, mainly, the charges are closely connected and were committed within a short space of time by the same role players. Furthermore, as it has been established, the respondent could not provide any explanation as to why the traps were repeated several times and why the appellants were only arrested and prosecuted after a long delay.

[51] In the result the appellants are sentenced as hereunder:

Order:

51.1 Gerhardus Muller:

The sentences imposed by the Magistrate are set aside and replaced with the following sentence:

“All the four charges are taken together and the accused is sentenced to two years imprisonment. The sentence is antedated to 25 April 2019.”

51.2 Petrus Gelant:

“All the six charges are taken together and the accused is sentenced to four years imprisonment. The sentence is antedated to 25 April 2019.”

51.3 Clinton Kastoor

The sentences imposed by the magistrate are set aside and replaced with the following sentence:

“All the five charges are taken together and the accused is sentenced to three years imprisonment. The sentence is antedated to 25 April 2019.”

L.P TLALETSI

JUDGE PRESIDENT

Northern Cape Division, Kimberley

I concur

VM PHATSHOANE

ACTING DEPUTY JUDGE PRESIDENT

Appearances:

On behalf of the: Appellant 1(Mr Kastoor): Adv H. Steynberg (Legal Aid SA)

Appellant 2 (Mr Gelant): Mr W. Booth

Appellant 3 (Mr Muller): Mr A. Van Tonder (Legal Aid SA)

On behalf of the State: Adv T. Barnard (DPP)

[1]S v Mabena 2014 (2) SACR 43 (GP) and S v Nyumbeka 2012 (2) SACR 367 (WCC) at 371-372 ; S v Nyumbeka 2012 (2) SACR 367 (WCC) at 371 to 372.

[2] To address this problem a subcommittee of the Provincial Efficiency Enhancement Committee (PEEC) has been tasked to investigate this problem and provide recommendations to address the problem.

[3] It is not clear on the record whether this income was weekly, fortnightly or monthly. Nothing turns on this.

[4] S v Bogaards 2013 (1) SACR 1 (CC) at page 14 para [41].

[5] S v Malgas 2001 (1) SACR 469 (SCA) at page 478 para [12].

[6] S v Mthethwa and others 2015 (1) SACR 302 (GP) at page 307 para [15].

[7]S v Maphisa 2019 JDR 2627 (GJ) at para 6.

[8] Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC).

[9] Prince v President, Cape Law Society and Others

[2002] ZACC 1; 2002 (2) SA 794 (CC) at page 820 para [61].

[10] See S v Sebata 1994 (2) SACR 319 (CPD); S v Jimenez 2003 (2) SACR 507 (SCA) at 520 G.

[11] S v Xaba and another 2005

(1) SACR 435 (SCA) para 9.

[12](Supra) at page 438 para 11.

[13] S v Timerez 2003 (1) SACR 507 (SCA) pages 512A para 6.

[14] S v Umeh 2015 (2) SACR 395 (WCC).

[15] Case Number CA&R 92/07; Heard on 11/02/2008 delivered on 15/05/2008.[2008] ZANCHC 5.

[16] Case Number CA&R 31/2015; heard on 31/08/2015 delivered on 04/09/2015.

[17] Case number CA & R47/15; heard on 09/11/2015 and delivered on 15/01/2016.

[18] S v Maphisa 2019 JDR 2627 (GJ).

[19] Arendse v Magistrate Wynberg and others 2017 (1) SACR 403 (WCC). It must be highlighted that the matter before the High Court was not about the consideration of the sentence imposed. It had to do with applicant unsuccessfully seeking an order that he be deemed to have served his term of imprisonment, imputing blame on the authorities for not informing him that his appeal to the Supreme Court of Appeal had failed after a delay of a period of eight years. He was found to have been partly to blame for doing nothing on his part.

[20] S v Kruger 2012 (1) SACR 369 (SCA) para 10.

[21] S v Dlamini 2012 (2) SACR 1 (SCA) at para [33].

[22] S v Muller and another 2012 (2) SACR 545 (SCA) at para [9].

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