

SOUTH AFRICA / JUDGMENT

Solani v S (CA&R331/2015) [2016] ZAECHGHC 17 (22 March 2016)

[2016] ZAECHGHC 17

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, B Majiki

CASE / FILE NUMBER

CA&R331/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R331/2015

DATE HEARD: 16/03/2016

.DATE DELIVERED: 22/03/2016

In the matter between

SINDISWA SOLANI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] This is an appeal against sentence, with the leave of the trial court. The appellant pleaded guilty in the Magistrate's

Court at Pearston to a contravention of s 4 (b) of the Drugs and Drug Trafficking Act 140 of 1992, namely the unlawful and intentional possession of 21 Mandrax tablets, 7 half Mandrax tablets, 8 quarter Mandrax tablets, and 21 Tik straws. She was convicted on her plea of guilty and sentenced to 30 months' imprisonment, 18 months of which was conditionally suspended for 5 years.

[2] The appellant's plea statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 was as follows:

"I am the accused person in this matter.

The facts herein contained are, unless the context otherwise indicates, within my personal knowledge and belief and are both true and correct.

I am charged with possession of drugs as per the charge sheet and the Annexure thereto.

I fully understand the charge against me as explained by my legal representative.

I hereby plead guilty to this charge and hereby admit as follows:-

I admit that upon or about the 08th May 2015 and at or near Vaalblok within the district of Pearston, I was found in possession of an undesirable dependency producing

substance to wit 21 x mandrax tablets, 7 x ½ mandrax tablets, 8 x ¼ mandrax tablets, & 21 x tick straws.

I wish to explain that I am very sorry that I am involved in this matter. The circumstances that led to this incident unfolded as follows:-

I was visiting a boyfriend of mine at Pearston Nzemeni Jokwana at his home. It was for the second time that I visited him. Nzemeni Jokwana left for town, leaving me with one Moses Mafola in his house.

Whilst ironing in the kitchen, Police knocked at the door and Moses Mafola came to me saying here come the Police, I must hide Nzemeni Jokwana's drugs as the Police won't search me. I took the said drugs as mentioned here above and hide them underneath my clothes to protect Nzemeni Jokwana as Moses advised.

Police came in and searched the house with a search warrant, and when searching me, they found all the said drugs in my physical possession.

I admit that at the time I took the said drugs and hide them on me, I knew that they were in fact drugs and that I had no right or permission to possess them and therefore, my possession thereof was both unlawful and intentional.

I make this statement freely and voluntary without any undue influence from any person and in my sound and sober senses.

I humbly place myself at the mercy of this Honourable Court and hereby I request it to have mercy on me as I am deeply remorseful for my conduct.”

- [3] At the time of sentencing the appellant was 26 years old and a first offender. She passed Grade 12 at school and has a further qualification which was described as a “certificate in security”. She is unemployed and resides with her unemployed mother. Her attorney submitted that the opportunity of a career as a security officer was lost as a result of her conviction. He submitted that she showed remorse for her conduct, that she had been influenced by Majola to hide the drugs, and consequently had not had the opportunity to decide independently whether or not to hide the drugs. Further, the appellant was willing to testify against Jokwana, the owner of the drugs. She had not known that he was selling drugs.
- [4] In his judgment on sentence the magistrate commenced by referring to the seriousness with which the legislature regards drug offences by prescribing long terms of imprisonment. He went on to describe the disastrous effect of drug use on communities, for example the fact that children as young as 10 years old are addicted to tik, and that the chances of admission to rehabilitation centres are non-existent. He stated that the only people who are “happy” in these communities of dysfunctional families are the drug lords who make money and are difficult to trap. The magistrate went on to state that most of the drug offences in Pearston involved possession of mandrax. He estimated the value of the mandrax found in the appellant’s possession at over R3 000.00. He did not know the value of the tik but mentioned that it is more addictive than mandrax. In his view the amount of drugs found in the appellant’s possession warranted a sentence which would indicate to drug lords that if a person is found with mandrax and tik he or she will be treated harshly by the court. The Court needed to send out a message to the district that involvement with mandrax and tik would not be tolerated. The magistrate further took into account a submission by the prosecutor to the effect that the appellant had prevented Jokwana’s arrest. In his address the prosecutor had submitted that the appellant’s conduct was close to obstructing the course of justice in that she had prevented a drug dealer from being arrested.
- [5] The magistrate took into account that the appellant was remorseful, that she was young, that she had completed grade 11 (it should have been grade 12), that she had studied in the security field, and that she was put under pressure by Majola to hide the drugs. He however stated that being educated and in the security field she should have been able to think clearly under pressure. He was of the view that a suspended sentence would over-emphasize the appellant’s personal circumstances and would not be proportionate to the seriousness of the offence and the community’s attitude to the offence.
- [6] In *S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10] Scott JA said the following with respect to an appeal court’s powers to interfere with sentence:

“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

[7] The magistrate was correct in his observations of the scourge of drug use in communities and the evils perpetrated by drug lords.

However I am of the view that this is a case of sacrificing someone on the altar of deterrence. The sentence imposed on the

appellant was used as a means of sending a message to drug dealers. This was a misdirection. In emphasising the seriousness of the offence and the effect of drugs on communities, the magistrate failed to observe the need for individualisation of sentencing and the particular circumstances of this case.

[8] It is apposite to refer to two judgments of this court. In *S v Xhego* [2005] JOL 15315 (E) the accused had been sentenced to a fine of R1 800 or 18 months’ imprisonment for possession of 10¾ Mandrax tablets. On review Kroon J said the following:

“In response to a review query the magistrate laid stress on the alarming incidence of the offence of contravening section 4(b).

I agree that the prevalence of the offence enjoins the courts, by way of the sentences they impose, to play a pro-active role in combating that incidence. It need also hardly be stated that possession of Mandrax tablets is a more serious offence than possession of dagga.

The punishment imposed should, however, also fit the offender. The accused is a 20-year-old first offender. In the light hereof, and also to promote his rehabilitation, I consider that it would be appropriate to suspend a portion of the sentence.”

The sentence was amended by conditionally suspending half thereof.

[9] In *S v Webster*

[2006] JOL 18776 (E), also a review matter, Plasket J said the following at para [9]:

“..... the prevalence of drug abuse cannot, on its own, be sufficient to justify a sentence of direct imprisonment where on all the facts such a sentence is not otherwise justified. The accused should not be sacrificed on the altar of deterrence.”

[10] The appellant was not convicted of dealing in drugs. She is not a drug lord. While the amount of drugs found in her possession was fairly substantial, she had possession for a short time, she acquired such possession as a result of pressure from Majola, she did not intend to possess the drugs for her own use, and she was remorseful. The appellant is also a person who has apparently persevered so far in becoming a responsible member of society. She passed grade 12 and acquired further qualifications. Her opportunities now for employment in her chosen field may well be compromised. In my view these were compelling factors which received insufficient attention from the magistrate and were in fact under-emphasised.

[11] A further misdirection in my view was the magistrate's statement that the appellant had prevented the arrest of Jokwana.

There was no evidence to that effect. Nor was there evidence that Jokwana was a drug dealer. The prosecutor merely stated that he was a drug dealer. It is so that the appellant's attorney stated that the appellant did not know that Jokwana was selling drugs, but in my view that statement was a tenuous foundation for accepting that Jokwana was a dealer.

[12] These misdirections allow this court to interfere with the sentence imposed. I am also of the view that direct imprisonment in the particular circumstances of this case induces a sense of shock. The compelling factors mentioned above militate strongly against sending a first offender to prison. A suspended sentence of imprisonment would bring home to the appellant the seriousness of her conduct and serve as a warning to her to avoid similar conduct in the future.

[13] In the result the following order will issue:

[13.1] The appeal succeeds.

[13.2] The sentence of 30 months imprisonment, 18 months of which was conditionally suspended for five years, is set aside and substituted with a sentence of 12 months imprisonment, suspended for 5 years on condition the appellant is not convicted of a contravention of s 5

(b) of s 4 (b) of Act 140 of 1992, committed during the period of suspension, and for which the appellant is sentenced to direct imprisonment without the option of a fine. The sentence is ante-dated to 15 October 2015.

J M ROBERSON

JUDGE OF THE HIGH COURT

MAJIKI J:-

I agree

B MAJIKI

Appearances:

For the Appellant: Adv D Geldenhuys, instructed by Grahamstown Justice Centre

For the Respondent: Adv M September, Director of Public Prosecutions, Grahamstown

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