IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA] 8/5/15

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

08 / 05 / 2015
DATE

SIGNATURE

CASE NUMBER: A170/14

In the matter between:

UCHECHUKU OHA	First Appellant
SAMKELISWE KHANYILE	Second Appellant
And	
THE STATE	Respondent

JUDGMENT

STRAUSS, AJ:

1. The first appellant was convicted in the Regional Court, Benoni on two counts of contravening Section 5 (b) of Act 140/1992 (dealing in drugs) and on a single count of contravening Section 49 (1) of the Immigration Act 13/2002. He was sentenced to a period of 25 years imprisonment on each count of contravention of the Drug Trafficking Act and 3 months imprisonment on contravention of the Immigration Act. The court *a quo*

ordered that the sentence on the two counts of contravention of the Drug Trafficking Act, run concurrently.

2. The second appellant was also convicted on two counts of contravening Section 5 (b) of Act 140/1992 (dealing in drugs) and sentenced to a period of 25 year imprisonment on each count of contravention of the Drug Trafficking Act, and the order was that the sentence was also to run concurrently.

3. Leave to appeal their sentence only was granted by way of petition of this court.

4. The test applicable to appeal against sentence was set out in **S v Salzwedel 1999 (2) SACR 586 (SCA)** that:

> *"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 desparate or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably."*

The general approach to be followed by a court of appeal when considering an appeal was as stated in: ***S v Peters 1987 (3) SA 717 (A).***"

"*Met betrekking tot appèlle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie hof beklemtoon dat vonnisoplegging berus by die diskresie van die Verhoorregter en juis omdat dit so is, kan ek en sal hierdie hof nie ingryp en die vonnis van 'n Verhoorregter verander nie tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel, daar is ruimte vir hierdie hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike en onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appèlle teen vonnis beheers.*

5. The background facts of the convictions were that the two appellants had control over two premises, one a self-storage facility in Benoni, and the other a house in Germiston. During March and June 2010, undetermined amounts of illegal substances were found in these premises. It is clear from the evidence and photos handed in as exhibits that these substances were only stored in the storage room in Benoni and evidence of past manufacturing of illegal depending drugs was found in the house in Germiston. The substances found in the storage facilities were all

dangerous dependence producing substances as listed in Part 1 and or Part 2 of Schedule 2 of Act 140/1992.

6. No evidence was lead as to the quantity and or value of these substances in the court *a quo,* and also no evidence was lead concerning what actual 'drug" was made with these substances. The evidence however was clear that the house was used to manufacture drugs, although no actual finished product was found.

7. The evidence was also that the two appellants were not alone in the commission of the offence and evidence was lead that a certain Alex Sithole was also involved, as well as another unknown Nigerian. It was not proven who was the leader of the drug manufacturing scheme or in what manner the appellants were involved in the manufacturing. Neither the first nor second appellants reside in the home in Germiston where the manufacturing took place, although the rental agreement of the storage facility was in the name of the second appellant.

8. Both the appellants had legal representation throughout the trial, they gave no plea explanation and also did not testify in their defence when the state had closed its case. The evidence for conviction was beyond reasonable doubt and the conviction of the appellants was justified.

9. The appellants both obtained pre-sentencing reports in regards to mitigation of their sentence and the court *a quo* was also addressed by their legal representatives on their personal circumstances. The mitigation address and facts contained in the pre-sentencing reports comprised approximately 40 pages and formed part of the appeal record.

10. The reports also contained correctional supervision reports qualifying both appellants as suitable candidates for correction supervision in terms of Section 276 (1) (i) and 276 (1) (h) of the Criminal Procedure Act 51 /1977.

11. In stark contrast to this the sentence of the court *a quo* of the two appellants comprises two pages. The court *a quo* mentioned on two occasions in handing down sentence that it was due to time constraints that the court was not giving full reason for the sentence. The court *a quo* also with notice to provide reason for conviction and sentence pending the notice of appeal lodged by the appellant, chose not to provide any reason and referred to the record of proceeding for its findings.

12. It is settled law that a court of appeal does not have an unfettered discretion to interfere with the sentence imposed by a trial court. It is only where it is clear that the discretion of the trial court was not exercised judicially or reasonably, that a court of appeal will be entitled to interfere.

13. It is trite that whatever the gravity of the offence is, and the interest of society, the most important factors in determining sentence are the person, the character, and the circumstances of the crime. Holmes JA in the often quoted statement from the case of **S v Sparks 1972 (3) SA 396 (A) at Page 410H** held that :

"punishment should fit the the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy"

14. It follows that in determining the appropriate sentence the needs of the convicted person and the interest of society should be balanced with care and understanding. In order to achieve these ideals the sentencing court should have sufficient and meaningful pre-sentencing information in order to come up with a suitable punishment. The court *a quo* in the matter in causa had the pre-sentence reports but made no mention of the personal circumstances contained therein, save to mention that appellants were still both young, and had minor children and were self-employed.

15. The court *a quo* also mentioned that the sentence imposed needs to be the "*kind of sentence that will inspire a fear on those who are engaged in these kind of activities, and would also deter the appellants and any would be offenders to commit similar offences*".

16. As set out by Corbett, JA in the case of **S v Rabie** 1975 (4) SA 855 (AD) wherein it was stated: "*that a judicial officer should not approach a punishment in the spirit of anger because being human that will make it difficult for him to achieve the delicate balance between a crime, the criminal and the interests of society, which is his task and the object of the punishment demanded of him*".

"It is of paramount importance to have an offender adequately profiled before sentence is imposed. Unless this is seen to have been done, it cannot be said that the punishment fits an offender"

17. The sweeping statements made by the court *a quo* in the sentence were unhelpful on appeal. It was not enough to simply comment that the trial court had regards to the "triad in Zinn" of sentence and had taken note of the pre-sentencing reports. It is of utmost importance that all the factors relevant to the appellant's personal profile be specified by the sentencing court itself in the sentence component of the trial court. This is particularly so in a case where the crime committed will attract the severe form of punishment, in the matter in causa being the maximum sentence of 25 years prison sentence on conviction.

18. As stated in ***Tankise Mokoena v The State in Appeal 323/2010 Free State High Court Bloemfontein, 9 February 2012, RAMPAI J*** :

"The trial court fleetingly glossed over the appellant's mitigation factors. Where such mitigation factors are not so specifically mentioned and meaningfully assessed, considered and properly weighed up, a reasonable perception or doubt is thereby created that the offender was not properly individualised before he was sentenced"

"It has to be mentioned that legal argument is not supposed to form part of the appeal record see ***S v Ramavhale 1996 (1) SACR 639 (A)*** *it is imperative therefore that the sentence segment of the proceeding should be so independently crafted that the mitigation factors and indeed aggravating factors can be readily ascertained ex facie the sentence segment itself without any reference to legal argument."*

19. The court *a quo* also had before it detailed pre-sentencing reports setting out the specific method of correctional supervision and that the appellants could be a likely candidates. I cannot however find that correctional supervision can be an alternative sentence for the first appellant in light of the fact that his status is that of an illegal immigrant in South Africa, and he might face deportation after his prison sentence is served.

20. It was argued by counsel in the court a quo and also by counsel appearing in the appeal that on a comparative assessment of other sentences imposed for the commission of similar offences, the sentence was disturbingly inappropriate.

21. Indeed, if I have regard to some comparative sentences it is somewhat higher than sentences imposed recently in similar circumstances: see, for example, *S v Hightower* 1992 (1) SACR 420 (W); *S v Randall* 1995 (1) SACR 559 (C); *S v Opperman* 1997 (1) SACR 285 (W); *S v Homareda* 1999 (2) SACR 319 (W); and *S v Mkhize* 2000 (1) SACR 410 (W) where the sentences for trafficking in drugs have ranged from an effective period of five to ten years' imprisonment.

22. It is evident that there was a shocking disparity between these sentences and the sentence of 25 years imposed on the appellants. The 25 year is the maximum prison sentence for a conviction on a charge of contravention of Section 5 (b) of Act 140/1992 (dealing in drugs).

23. While it may be useful to have regard to sentences imposed in other similar cases, each offender is different, and the circumstances of each crime vary. Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.

24. In sentencing the appellants the following mitigation factors would traditionally have been taken into account:

-They were married by common law and had been in a relationship for 7 years.

-The appellants had two minor children, aged four and three both these minor children would lose their primary care giver the second appellant,

as well as the breadwinners being the first and second appellants, and would be left destitute if they could not be cared for sufficiently by someone else.

- The evidence was that the sister of the second appellant was caring for the children but she was struggling financially to care for them, she stayed in Natal, had children of her own and had not informed the children of their mother's incarceration.

-The involvement and which roll each played in the committal of the offence was not before court.

-They were both first offenders.

-The first appellant was 33 years old on date of sentence and the second appellant was 30 years old at the date of sentence,

-The second appellant has another child from a previous relationship who was 8 years old but stayed with the biologic father, who had been caring for the child.

-The first appellant is an illegal immigrant from Nigeria, and has no legal status in South Africa.

-Before the conviction the appellants managed a boutique and could after their release start a business in clothing and they still had stock left to sell.

-The first appellant had been awaiting trial for a period of two years and six months before he was sentenced.

-The second appellant had spent three months in prison awaiting sentence.

-No evidence was adduced that either of the appellants had in actual fact sold any illegal substance, they had been involved in the manufacturing thereof.

-The quantity of the illegal substances found were not known to the trial court, nor the reasonable market value of the illegal substances confiscated by the police.

-There was evidence that the first appellant throughout his incarceration was a model inmate and was able to start working in prison even though awaiting trial prisoners are not granted this opportunity lightly, further that he had joined a religious service and had completed a life skill course in prison.

-Both appellants had grade 12 qualifications and were through their life gainfully employed, the second appellant in terms of the correctional supervision report could take up lodging with her cousin who would initially support her an the minor children until she could start her own business.

-The first appellant was born in poverty and came from an unstable and impoverished background, he had been in South Africa since 2003.

-The state applied for forfeiture of two motor vehicles belonging to the appellants in terms of Section 25 of Act 140/1992 as the vehicles were impounded in the arrest of the appellants both these vehicle were registered in the name of the second appellant .The forfeiture was granted by the court *a quo*.

25. In sentencing the appellants the court *a quo* took into account the following aggravating circumstances.

-The seriousness of the offence and that the offence was prevalent in the court jurisdiction, and that the appellants did not testify as to the circumstances of committal of the offence and that they therein showed no remorse.

26. As stated in ***Tankise Mokoena v The State in Appeal 323/2010 Free State High Court Bloemfontein, 9 February 2012, RAMPAI J*** :

"The trial court fleetingly glossed over the appellant's mitigation factors. Where such mitigation factors are not so specifically mentioned and meaningfully assessed, considered and properly weighed up, a reasonable perception or doubt is thereby created that the offender was not properly individualised before he was sentenced"

"It has to be mentioned that legal argument is not supposed to form part of the appeal record see ***S V Ramavhale 1996 (1) SACR 639 (A)*** *it is imperative therefore that the sentence segment of the proceeding should be so independently crafted that the mitigation factors and indeed aggravating factors can be readily ascertained ex facie the sentence segment itself without any reference to legal argument."*

27. In regards to the fact that minor children will be affected by imposing a sentence of incarceration on the primary care giver and or breadwinner of such children the principels to apply were set out in ***S v M (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 CC*** where Sachs J, held:

[33]" *Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all*

sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mind-set.

Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court."

[34]" *In this respect it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct. This would be a mischaracterisation of the interests at stake. Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable."*

[35] *"Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The*

purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm".

[36] *"There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.*

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If on the Zinn triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose. "

[47] *There was virtually nothing in the Regional Magistrate's reasons for sentence to show that she applied a properly informed mind to the duties flowing from section 28(2) read with section 28(1)(b). It appears from the argument advanced on behalf of the State that the Regional Magistrate was acting in a manner largely consistent with current practice. If, however, paramountcy of the children's interests is to be taken seriously, and this is present sentencing practice, this practice needs to be reviewed so as to bring it in line with constitutional requirements.*

28. I find, that the court *a quo* passed sentence without giving sufficient independent and informed attention as required by section 28(2) of the Constitution read with section 28(1)(b), to the impact on the children of sending both the appellants to prison. In these circumstances the sentencing court misdirected itself by not paying sufficient attention to constitutional requirements. This Court is therefore entitled to reconsider the appropriateness of the sentence imposed by the court *a quo*.

29. The court *a quo* also did not pay attention to the suggestion by the defence that instead of ordering forfeiture of the motor vehicles to the

state, the vehicles could be sold by the family of the appellants, to utilise the proceeds to maintain the minor children of the appellants.

30. The court *a quo* also to my mind did not consider that the first appellant had already spent two years and six months awaiting trial and the sentence imposed reflects no such consideration.

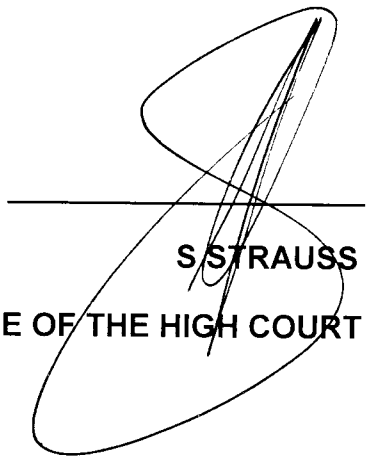
I therefore make the following order:

a) The appeal against the sentence is upheld.

b) The court *a quo's* sentence is amended as follows:

c) The first appellant is sentenced to 12 (twelve) years imprisonment on each count of contravening Section 5 (b) of Act 140/1992 (The Drug Trafficking Act), and 3 (three) months imprisonment for contravention of the Immigration Act, the sentence on the two counts of contravention of the Drug Trafficking Act will run concurrently, and the sentence is antedated to 9 November 2012.

d) The second appellant is sentenced to 10 (ten) years prison sentence in terms of Section 276 (1) (i) of the Criminal Procedure Act 51/1977, which sentence is antedated to 9 November 2012, and a period of 3 (three) years prison sentence is suspended for a period of 5 (five) years, on condition that the appellant is not found guilty of an offence in contravention of Act 140/1992 (The Drug Trafficking Act).



S STRAUSS

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING	: 23 APRIL 2015
DATE OF JUDGMENT	: 08 MAY 2015
APPLICANT'S ATT	: PRETORIA JUSTICE CENTRE
APPLICANT'S ADV	: ADV V WYNGAARD
RESPONDENT'S ATT	:DIRECTOR OF PUBLIC PROSECUTIONS PTA
RESPONDENT'S ADV	: ADV J J KOTZE