



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 31/2015**
Datum verhoor/Date heard: **31/08/2015**
Datum gelewer/Date delivered: **04/09/2015**

In the matter between:

SIFISO RADEBE

Appellant

and

THE STATE

Respondent

Coram: Erasmus, AJ et Mamosebo, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

[1] This is an appeal against the sentence of 3 years imprisonment imposed by the Magistrate Galeshewe in case number 1528/2014. The appellant was convicted of a contravention of section 5(b), read with certain other

provisions of the Drugs and Drug Trafficking Act, No. 140 of 1992 ('the Act'), to wit dealing in 3,9 kilograms of dagga. The appellant was convicted and sentenced on 12 March 2015. He was released on bail pending the appeal against his sentence on 23 April 2015 and thus served almost six weeks of the sentence imposed.

- [2] It is the case of the appellant that the learned Magistrate misdirected himself in over-emphasizing the interests of the community and the previous conviction of the appellant and not attaching sufficient weight to the favourable personal circumstances of the appellant. It is further submitted that the learned magistrate imposed a sentence that is unduly harsh in that it can be described as disturbingly inappropriate and induces a sense of shock.
- [3] The appellant and his co-accused pleaded not guilty and both were convicted. The co-accused of the appellant was a first offender and was sentenced to two years imprisonment which was wholly suspended for 5 years on certain conditions, plus a fine of R6,000.00 or 12 months imprisonment.
- [4] Mr. Nel, on behalf of the appellant, referred to several unreported cases of similar nature and submitted that the sentence imposed on the appellant differs materially from the sentences imposed in those cases. He submitted that

the sentence imposed on the appellant is disturbingly inappropriate and induces a sense of shock.

[5] Mr. Hanise too, on behalf of the State, conceded that the sentence imposed by the trial court induces a sense of shock. I fully agree with this concession made on behalf of the State.

[6] The correct approach which this court must follow when deciding if we are to interfere with the sentence imposed by the court *a quo* was set out by Rumpff JA in *S v Anderson*¹:

'A court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.'

[7] Although the facts of each and every case differ, it is often useful to look at other similar cases when deciding what an appropriate sentence would be in a matter.

¹ 1964 (3) SA 494 (A) at 495G-H; See also *S v L* 1998 (1) SACR 463 (SCA) 468f-h; *S v Romer* 2011 (2) SACR 153 (SCA) at [22]-[23]

- 7.1 In the unreported matter of **S v NKOSI**², the appellant was sentenced to 4 years imprisonment for dealing in 20kg of dagga. On appeal the sentence was set aside and replaced with a fine of R10,000.00 or 4 years imprisonment. In this current matter the accused had a previous conviction for a similar offence as has the appellant in this matter.
- 7.2 In the matter of **S v HLAHELE**³ (523/2008), the appellant was convicted of dealing in 61kg of dagga and was sentenced to 36 months imprisonment of which eight months were suspended. He was a first offender and pleaded guilty. On appeal his sentence was set aside and replaced with a fine of R3,000.00 or 12 months imprisonment plus a further suspended sentence of 12 months imprisonment wholly suspended on certain conditions.
- 7.3 In the matter of **GAVIN FRANS & ANOTHER v S**⁴ an unreported case of this Division, the appellants were convicted of dealing in 61 kg of dagga. After conviction, having pleaded not guilty, they were sentenced to 5 years imprisonment of which 2 years

² (A465/2011) [2012] ZAGPPHC 326

³ (523/2008) [2008] ZAFSHC 128

⁴ (CA&R201/2014) ZANCHC

were suspended. On appeal the Court expressed the opinion that a fine coupled with a suspended sentence of imprisonment would have been suitable, but as the appellants had already served a part of their sentences, the sentence was changed to one of 3 years imprisonment of which 20 months were suspended for 5 years on certain conditions.

[8] It is trite law that when imposing sentence the court has to take into account the personal circumstances of the appellant, the seriousness of the offence and the interest of the community. From the record of proceedings it appears that the trial court placed a lot of emphasis on the interest of the community and the seriousness of the offence. It goes without saying that the offence the appellant was convicted of is very serious and that the interest of the community takes high priority in offences of this nature, especially when a large amount of dagga is found as in this case.⁵

[9] These factors though should not be over-emphasized at the cost of the personal circumstances of the appellant. When the personal circumstances of the appellant and his co-accused are compared, it appears that the only material

⁵ *S v Bartlette* (CA&R 92/07) [2008] ZANHC 5

difference is the fact that the appellant has a previous conviction for possession of dagga. He was sentenced to a fine of R1,000.00 or 14 months' imprisonment, suspended for 5 years on certain conditions including that he is not convicted of contravening section 5(b) of the Act, during the period of suspension. It should be kept in mind that more than seven years have lapsed between his sentence and the commission of the offence which is currently on appeal before us.

[10] Having considered the sentences in cases of similar nature and also the sentence imposed on the co-accused of the appellant and, without derogating from the seriousness of the offence, I find no reason why the appellant in this instance should have been sentenced to direct imprisonment. I would have imposed a sentence similar to that of the appellant's co-accused. It should be kept in mind that he was detained for almost 6 weeks after his conviction and sentence before he was released on bail pending his appeal. The difference between the sentence this court would have imposed and the sentence actually imposed is thus so great that the inference can be made that the trial court acted unreasonably.

[11] For the reasons set out above the appeal must succeed and therefore I make the following order:

1. THE APPEAL SUCCEEDS.

**2. THE SENTENCE IMPOSED BY THE MAGISTRATE
GALESHEWE UNDER CASE NUMBER
GAL1528/2014 IS SET ASIDE AND REPLACED
WITH THE FOLLOWING:**

**“2 YEARS IMPRISONMENT, WHOLLY SUSPENDED
FOR A PERIOD OF 5 YEARS ON CONDITION THAT
THE ACCUSED IS NOT CONVICTED OF A
CONTRAVENTION OF SECTION 5(b) OF THE
DRUGS AND DRUG TRAFFICKING ACT 140 OF
1992 TO WIT DEALING IN DAGGA, COMMITTED
DURING THE PERIOD OF SUSPENSION PLUS A
FURTHER FINE OF R6,000.00 OR 3 YEARS
IMPRISONMENT”**

**SL ERASMUS
ACTING JUDGE**

I concur.

**MC MAMOSEBO
ACTING JUDGE**

<u>For the Appellant:</u>	Adv. IJ Nel (oio André Potgieter & Partners)
<u>For the Respondent:</u>	Adv. SJ Hanise (obo the NPA)