

Reportable:	YES /
NO	
Circulate to Judges:	YES /
NO	
Circulate to Magistrates:	
YES / NO	
Circulate to Regional Magistrates:	
YES / NO	

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case No: CA&R 92/07
 Heard: 11/02/2008
 Delivered: 15/02/2008

In the matter:

JEROME BARTLETTE

Applicant

and

THE STATE

Respondent

Coram: Bosielo AJP et Mokgohloa AJ

JUDGMENT ON APPEAL

BOSIELO AJP

- 1] This is an appeal against sentence only. On 24 September 2004 and in the Regional Court, Kimberley, the appellant pleaded guilty to dealing in undesirable dependence-producing substances in contravention of section 5(b) read with sections 1, 13(f), 17(e), 25 and 64 of Act 140 of 1992 further read with Part III of Schedule 2 of Act 40 of 1992. He was sentenced to imprisonment for a period of 12 years.

- 2] With leave of the court a quo, the appellant is now appealing against his sentence. The foundational ground of appeal against the sentence is that the magistrate erred or misdirected himself by over-emphasising the seriousness of the offence at the expense of the appellant's personal circumstances as a result whereof he imposed a sentence which is shockingly severe and disturbingly inappropriate. As a result, this court is requested to interfere with such a sentence and impose an appropriate sentence.

- 3] It remains a salutary and well-established principle of our law that sentencing resides pre-eminently within the discretion of the trial court. The powers of an appeal court to interfere with the sentence imposed by the trial court are therefore clearly and seriously circumscribed. Undoubtedly, this is intended to avoid unjustified erosion of the sentencing powers and discretion of the trial court by the appeal court. Over the years our courts have given different interpretations to the test to determining when the appellate court can interfere with a sentence imposed by the trial court. Regrettably in the process some subtle confusion has crept in and created some serious uncertainty. However, the acid test to determine when interference with a sentence by an appeal court is justified was, in my view, lucidly and authoritatively enunciated in **S v Kgosimore** 1999(2) SACR 238 (SCA) at p 241 para [10] where Scott JA stated the following:

“[10] 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. (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G - I.) 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. I can, accordingly, see no juridical basis for the stricter test suggested by counsel; nor is there anything in s 316B of the Act, or for that matter s 310A, to suggest otherwise. (See also *S v Anderson* 1964 (3) SA 494 (A).) It follows that, in my view, whether it is the Attorney - General (now the Director of Public Prosecutions) or an accused who appeals against a sentence, the power of a Court of appeal to interfere is the same.”

- 4] As the confusion surrounding this test did not appear to have dissipated, the Supreme Court of Appeal saw the need to define if not refine the test further. In **S v Malgas** 2001(1) SACR 469 (SCA) at p478 para[12] **Marais JA** elaborated on the test 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."

- 5] In determining whether the sentence imposed on the appellant is disturbingly inappropriate or shockingly disproportionate to the crime for which he was convicted, the court must consider the offence, its effects and its consequences or impact on the broader society and balance that against the personal circumstances of the appellant.
- 6] There is no doubt that the offence for which the appellant was convicted is very serious. Both counsel for the appellant and respondent were agreed on this aspect. It is clear from the charge sheet that the appellant was 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 heroine and another 10 grams of cocaine. The total value of all these drugs amounted to R 26 000-00.
- 7] I now have to consider and weigh the appellant's personal circumstances against the nature and seriousness of this offence as fully set out above. At the time of the commission of this offence the appellant was 29 years old with two minor children; since the appellant lost his job in Johannesburg in 1997, he has never been employed; it is not clear if the appellant is married or not; the appellant has one previous conviction for assault with intent to cause grievous bodily harm.
- 8] In considering an appropriate sentence, the magistrate found that the

interests of society far outweighed the personal circumstances of the appellant. He furthermore, found, correctly in my view, that the effects and impact of drug abuse in our communities are far-reaching if not catastrophic. This motivated him to find that the element of deterrence and retribution should enjoy precedence over reformation and rehabilitation of the appellant. I can find no fault with this approach.

- 9] The problem of drug-trafficking has haunted mankind for many years. With the passage of time, it has metamorphosed into a huge and intricate business enterprise which involves drug-lords, couriers, so-called runners and those who buy and use it. As far back as 1989, **Kriegler J** (as he then was) had the following to say about drugs and their effects in **S v Howe** 1989(2) SA 473 (W) at 478 E-G.

“Die gebruik van dwelmmiddels is verwerplik. Oor die jare heen het die Staat, dit wil sê Wetgewer, uitvoerende gesag en die regsplegende gesag, by herhaling sy onwrikbare teenstand teen hierdie maatskaplike euwel te kenne gegee. Te meer nog is daar stryd gevoer teen handelaars in dwelms. Die verfoeilikheid van hul rol is by herhaling beklemtoon. Hulle teer op verslaafdes. Hulle poog om hul bose besigheid in stand te hou en uit te brei. Dit doen hulle in die wete dat hul handelsvoorraad moreel verwerplik en maatskaplik benadelend is. Hulle is ook 'n noodsaaklike skakel in die verspreidingsnetwerk. Dit geskied met winsbejag.”

- 10] I strongly believe that it is no exaggeration to state that, with the effluxion of time, instead of abating the problem of dealings in drugs concomitant with drug abuse has become pandemic. It has developed into a serious malignant cancer which is fast eroding the social and moral fabric of our society. This is notwithstanding the tough stance taken by the Legislature, coupled with the severe sentences which our courts impose. There is hardly a day that passes without a report in the media of some people arrested for either dealing in drugs or using drugs or importing them into our country. In recent times our country has been seriously invaded by a variety of drugs which are imported from some overseas countries. Quite paradoxically, our country has become a safe haven for drug-lords since the advent of democracy. We are caught in the big and intricate web of international drug-trafficking. What is even more frightening is how drugs

have found their way into our schools which used to be regarded as safe citadels for our children. Our youth, students and even school children are at a serious risk of becoming drug addicts. In the quest for quick profit, the unscrupulous drug peddlers make no distinction. Nobody is spared from this scourge as drug-dealers spread their tentacles more wider. They sell their drugs to everybody including our youth, students and school children. In fact because of their youthfulness, naivety, peer pressure and simple gullibility, our youth have become their easy target.

- 11] It is not surprising that **Steyn AJ** described drug dealers as follows in **S v Randall** 1995(1) SACR 559 (C) at 566(i):

“Drug dealers are unscrupulous criminals. They will use the weak, the gullible, and, may I add, the greedy. They are without conscience. They do not care for those who facilitate their evil objectives, nor do they have a concern about the lives they ruin by trafficking in drugs. Society is at risk should it hesitate to use every legitimate mechanism at its disposal to protect itself against their destructive designs. One of these weapons - and I emphasise that it is only one of them - is to make it clear to courier and principal alike, that the game is not worth the candle and that the price society exacts for transgressions will not be tempered by concern for the plight of the weak and the greedy.”

Commenting further on this ubiquitous and intractable problem **Steyn AJ** once again expressly himself strongly as follows in **S v Sebata** 1994(2) SACR 319 (C) at 325b-e

“Those who deal in these drugs, or who participate in the process of making such dealing possible, must expect to receive sentences which include substantial periods of imprisonment from our Courts. All the decisions emphasise the devastating impact the substances have on the lives of those who can become exposed to them, more especially the youth. It is therefore the duty of the Courts, in so far as sentencing plays its role as a deterrent, to use the sentencing process as effectively and wisely as possible in combating the incidence of these offences.

It is trite to say that each case must depend on its own facts. The personal factors operating in appellant's favour are that he is a relatively young person and a first offender. However, the following considerations need also to be given weight when one has to assess an appropriate penalty. Appellant did not give evidence as to what his role was. Was he merely a courier or was he part of a broader conspiracy to import cocaine into a new market? He expressed no remorse, he entered the country illegally on a false passport and he failed to co-operate with the police in their attempts to uncover those who were perhaps even more seriously involved in the commission of the offence.”

I am in respectful agreement with the above-quoted apt description of drug dealers and the strong aversion expressed by the court against drug-dealers.

- 12] The crisp question that I need to decide in this appeal is whether, given the above-stated facts, it can be said that a sentence of imprisonment for 12 years induces a sense of shock or is shockingly disproportionate to the

offence for which the appellant was convicted. As I alluded to earlier in my judgment the magistrate found that this case warranted a sentence based on deterrence than rehabilitation. Given the facts of this case, I can find no fault with that reasoning.

- 13] In deciding this question, I found useful guidance in the dictum by **M.T. Steyn J** in **S v J** 1975(3) SA 146 (OFD) at 155G where he stated that:

“In die Engelse reg is dieselfde standpunt gehuldig. In *R. v Ball*, (1951)35 Cr. App. R. 164, het Regter HILBERY dit gesê:

'In deciding the appropriate sentence a court should always be guided by certain principles. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living... Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.'"

- 14] Objectively speaking a sentence of 12 years imprisonment is severe and harsh. However, it is clear that by making provision for severe sentences, the Legislature was endeavouring to give the courts sufficient power to exterminate the ever-growing social evil of abuse of drugs in our community. Drug trafficking is a scourge all over the world. It is the kind of insidious evil that has the capacity to ruin mankind. In its wake, we find broken families, drug addicts and the youth who, due to naivety and lack of experience have proved to be easy prey to unscrupulous dealers. Undoubtedly this poses a serious challenge to our society. Our law enforcement agencies are doing their best to combat this scourge. The legislature has provided for severe sentences to act as a deterrent. Our courts cannot afford to sit supinely and ignore what is happening around us. Our courts have a duty and responsibility to rise up to the challenge. The courts can certainly make their contribution in the gallant fight against this pernicious evil by imposing appropriate sentences. In the circumstances, appropriate sentences are those that will send a clear and unequivocal message to the public including drug dealers that our courts will not hesitate to impose particularly severe sentences which are intended to act as deterrents even for those who dabble in drugs and prohibited substances. To my mind, drug-dealers deserve no sympathy or pity. They must face the full might of the law. See **S v Jeminez** 2003(1)

SACR 507 (SCA) at p522 par [36].

- 15] Having given this matter careful and anxious consideration, I am of the view that the personal circumstances of the appellant pale into insignificance when considered against the gravity of this offence. In my view, the greater public interest for protection of society against this scourge justify the sentence imposed on the appellant. I am unable to say that the magistrate failed to exercise his sentencing discretion properly. On the contrary I am constrained by the facts of this case to find, as I hereby do, that a sentence of 12 years imprisonment is appropriate. Severe as it might be, it is intended to send a clear message to all drug dealers that our courts have finally declared war on them. There is therefore no basis on which this court can legitimately interfere with such a sentence.

In the result and for the foregoing reasons, I make the following order:

The appeal against the sentence imposed on the appellant is dismissed.

L O BOSIELO
ACTING JUDGE PRESIDENT
Northern Cape Division

I agree.

F E MOKGOHLOA
ACTING JUDGE
Northern Cape Division

On behalf of the Applicant:	Adv. B. SEGONE
Instructed by:	KIMBERLEY JUSTICE CENTRE

On behalf of the Respondent:
Instructed by:

Adv. M. MASHUGA
DIRECTOR PUBLIC PROSECUTIONS