



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: A839/2016

In the matter between:

PHUMLANI SIBEKO

APPLICANT

versus

THE STATE

FIRST RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

SECOND RESPONDENT

JUDGMENT

MNCUBE, AJ (MBONGWE, J Concurring):

[1] The Appellant was convicted in the Regional Court Cullinan on 5 August 2015 for the offence of contravention of section 5 (b) of the Drugs and Drug Trafficking Act 140 of 1992 (DDTA).¹ The trial court sentenced the Appellant to six years imprisonment and declared the drugs forfeited to the State. On the 9 September 2015 the Appellant lodged an application for leave to appeal against the sentence which was denied. The Appellant then petitioned the Judge President in terms of section 309C of the Criminal Procedure Act 51 of 1977 (the CPA) as amended and was granted for leave to appeal against the sentence on 31 October 2016. On the 11 April 2022, the Court a quo granted condonation and leave to appeal against the

¹ Dealing in drugs.

conviction. The First Respondent is the State and the Second Respondent is Minister of Justice and Correctional Services.

[2] Following the granting of leave to appeal, the Appellant then gave notice to the State and Minister of Justice and Correctional Services as Respondents in terms of Rule 16A of the Uniform Rules of his intention to challenge the constitutionality of the presumption contained in Section 19(2) of the DDTA.²

[3] The factual background is that the Appellant is a thirty year old inmate at Zonderwater Correctional Centre. On a certain day presumably 11 October 2014 the Appellant was visited by his girlfriend Ms Phulani Sileteng who handed him the drugs which he attempted to hide. The drugs fell on the floor which was noticed by a prison official. This led to the Appellant being charged for possession of 0,41 grams of diacetylmorphine (heroin) and 18 tablets of methaqualone (madrax). He appeared in court on 22 January 2015. With the assistance of his legal representative, the Appellant pleaded guilty in terms of section 112 (2) of the CPA the offence of dealing in drugs and was convicted on the basis of his statement. The Court a quo applied the presumption contained in Section 19 (2) of the DDTA in convicting the Appellant who was subsequently sentenced to six years imprisonment.

[4] The Appellant has raised two grounds of appeal. The first ground is that the presumption contained in Section 19 (2) of the DDTA is unconstitutional for the following reasons-

1. The presumption is phrased in the manner which imposes a legal burden upon an accused person. The effect of the legal burden is that if an accused raises a reasonable doubt but fails to do so on a balance of probabilities, he must be convicted for dealing in drugs.
2. The presumption relieves the prosecution of the burden of proving one element of the offence (to wit intention to deal in drugs) which could result in the conviction despite the existence of a reasonable doubt. This is in breach of the presumption of innocence which offends the provisions of section 35 (3) (h) of the Constitution. For these reasons the Court a quo misdirected itself in finding that the presumption contained in Section 19 (2)

² Section 19(2) provides –'If in the prosecution of any person for an offence referred to in section 13 (e) or (f) it is proved that the accused was found in possession of a quantity of drugs which exceeds the quantity of such drugs which the accused could have acquired or bought for medicinal purposes in terms of a particular oral instruction or a particular prescription in writing of a medical practitioner, veterinarian, dentist or practitioner, it shall be presumed, until the contrary is proved, that the accused dealt in such drugs.'

of the DDTA found application by finding that the Appellant admitted all material facts for the application of the presumption.

[5] The second ground of appeal is that the Court a quo misdirected itself for its failure to exercise its discretion in applying the provisions of Section 113 of the CPA to correct the plea of guilty to that of not guilty. This is on the basis that the Appellant raised a valid defence that he intended to use the drugs.

[6] The issues for determination are whether or not the presumption contained in section 19(2) of the DDTA should be declared unconstitutional and whether or not the guilty plea should have been corrected in terms of Section 113 of the CPA by the Court a quo.

[7] Counsel for Appellant in his written heads of argument contends that it is apparent that both the Prosecutor and the Appellant's legal representative at the Court a quo were under the impression that Section 19 (2) of the DDTA presumption found application. This resulted in the trial court relying on the presumption in convicting the Appellant. The submission is that such a presumption imposes a legal burden upon an accused person which has the effect that if an accused fails to raise a reasonable doubt on a balance of probabilities he or she will be convicted of dealing in drugs. A presumption that puts a legal burden on an accused has been found to be unconstitutional as it offends the presumption of innocence. The argument is that the presumption of innocence is an established South African legal principle.

[8] The contention is that the presumption in Section 19 (2) of DDTA is constitutionally invalid and places reliance to the case of **S v Bhulwana; S v Gwadiso 1995 (2) 748 (CC)**. The submission is that a proper case has been made out and this Court should not remit the matter back to the trial court pending the confirmation of unconstitutionality of Section 19 (2) of DDTA. In relation to the second ground of appeal, Counsel submits that the conviction based on the Section 112 (2) statement is invalid and argues that the Court a quo misdirected itself in failing to exercise its discretion to invoke Section 113 of the CPA.

[9] Counsel for the Appellant contends that the Court of Appeal retains the discretion to refuse a remittal if it would be inappropriate. In regard to the imposed sentence, the argument is that the Court a quo despite being aware that the Appellant was serving a lengthy prison sentence, it imposed a sentence of six years without ordering that the sentences should run

concurrently. This had the undesirable effect that the Appellant would be in prison for thirty -five years. The contention is that the appeal against the conviction and sentence should be upheld.

[10] The First Respondent submits that the presumption referred to in the Appellant's plea is unconstitutional and invalid. Counsel contends that the issue is whether the presumption in Section 19(2) of DDTA was applicable in the circumstances of this case. The submission is that Section 19 (2) was not applicable. The contention is that the Appellant's legal representative in the Court a quo erred in advising the Appellant that the presumption was applicable. The argument is that the State could not rely on the presumptions in Section 19 or 21 and Counsel refers to **S v Mathe 1998 (2) SACR 225 (O)**³. The argument is that the Court a quo could not rely on the presumption to convict the Appellant and should have considered the evidence as a whole.

[11] The submission is that the Court a quo erred in relying on Section 19 (2) of DDTA as it related to health matters which presumption had no bearing in the matter. The argument is that the matter be remitted back to the trial court for noting of a plea of not guilty and for the trial to continue. In respect to the sentence, the contention is that there was no order of concurrency made however this aspect was addressed by the Court a quo during the application for leave to appeal which Counsel supports. The submission is that there is no basis for interference with the sentence imposed.

[12] The Second Respondent contends that Section 19(2) of DDTA is indeed unconstitutional on the basis of its inconsistency to the operation of the presumption of innocence. The submission is that the presumption relieves the State of proving intention but requires an accused to prove that he had no intention. The contention is that this presumption is in breach of the right to be presumed innocent. Counsel argues that the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. The submission is that the limitation is unreasonable. The contention is that Section 19(2) of DDTA does not pass constitutional muster.

³ In that matter it was held that it did not mean that dealing could never be deduced from possession. I express no view on the correctness of this.

[13] It is trite that a Court of Appeal will not likely interfere with the factual findings made by the trial court in the absence of an irregularity or misdirection.⁴ The court of first instance is recognised to be best placed to make assessment of all relevant facts and to apply correct legal principles.⁵ The approach to be applied by a Court of Appeal in instances where the Court a quo has misdirected itself is that the Court of Appeal is then free to come to its own findings whether an appellant is guilty beyond a reasonable ground. See **R v Tusini and Another 1953 (4) SA 406 (A)** at 412C-F.

[14] Before dealing with the issues for determination, I deem it prudent to remark on one aspect on the record. The record reflects that the Court a quo in its judgment in convicting the Appellant stated '*you are found guilty as charged*'. This in my humble view amounts to an inadequate judgment. It is well to reiterate the remarks made in **Mokela v S 2012 (1) SACR 431 (SCA)**⁶ para [12] where the late Bosielo JA stated '*I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds.*' It is the hallmark of justice that a judicial officer gives reasons why he or she is satisfied that indeed an accused person should be found guilty on the content of his or her statement.

[15] In deciding on the first issue (whether or not the presumption in Section 19 (2) of DDTA should be declared unconstitutional, it is necessary to briefly outline certain legal principles. The Court's power to declare a law to be inconsistent with the Constitution is based on Section 172 of the Constitution. This is a unique remedy.⁷ Section 172 (1) provides –

'When deciding a constitutional matter within its powers, a court –

- (a) Must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.'*

Once the declaration is made, the provisions of Section 172 (1) (b) comes into play.

[16] Section 172 (2) (a) provides-

'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of

⁴ See **S v Mkohle 1990 (1) SACR 95 (A)** at 100.

⁵ See **Giddey NO v JC Barnard & Partners 2007 (5) SA 525 (CC)** para [22].

⁶ Though that matter was about the failure of the Appeal Court to give reasons for setting aside the Regional Court's order, the principle still finds application on inadequate judgments.

⁷ See **Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)** para [8].

the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

[17] The issue of unconstitutionality must be decided on the facts of the matter applying the doctrine of objective constitutional invalidity⁸. In **City of Cape Town v Independent Outdoor Media (Pty) Ltd and Others (CCT36/22) [2023] ZACC 17** para [62], the Constitutional Court held that the doctrine of objective constitutional invalidity should be interpreted harmoniously with the Constitution as a whole.

[18] I am mindful that the Counsels have urged this Court to find that the presumption in Section 19(2) of DDTA is unconstitutional and consequently to be declared invalid. However, in my view such an order is inappropriate on the facts of this matter for two reasons. The first reason is based on the concession that the trial court erred in applying the provisions of Section 19 (2) of DDTA in circumstances when such a presumption did not find application. I am persuaded that the presumption should not have been applied by the Court a quo. On the acceptance that the presumption was not applicable, then the question is whether it is proper to declare such presumption invalid? It was not demonstrated that the issue falls within this Court's powers. To illustrate the point - the Constitutional Court only declared Section 21 (1) (a) (i) of DDTA invalid because the presumption was applicable to the facts before the Court hence it did not make any declaration in respect of any other presumptions in the DDTA.⁹ In short, it would be improper to make such a declaration when the presumption was not applicable.

[19] The second reason is that the facts in this matter fall short of the trite approach or test required to make the determination of invalidity.¹⁰ The correct approach for determining the constitutionality of an alleged violation involves a two -stage approach. The first stage is an enquiry whether the disputed legislation limits the rights in the Bill of Rights and if so whether the limitation can be justified. I hold this view within the context that the Appellant made certain admissions including the fact that the presumption was applicable. In the absence of withdrawal of such admissions, it would be improper for this court to make a factual finding that there was in fact a limitation of the Appellant's rights. This is a legal conundrum because admissions made in terms of a Section 112 (2) statement stand. Put differently, on what basis in the context of the facts of this matter can a finding be made with regard to the first part of the two- stage

⁸ See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (10 SA 984 (CC)).

⁹ See *S v Bhulwana* ; *S v Gwadi* 1995 (2) SACR 748 (CC).

¹⁰ See *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth prison and Others* 1995 (4) SA 631 (CC) para [9].

test? An enquiry on the limitation of rights is an integral part in the determination for invalidity. Put simply, what Counsels propose or urge this court to do is to make an order of invalidity automatically and in a vacuum. I am of the respective view that the fact that the presumption in section 19 (2) of DDTA do not find application which in turn has the effect of placing the presumption outside the ambit or power of this court.

[20] I must not be understood to be saying that where a presumption places a reverse onus on an accused it will stand the constitutional scrutiny. However, in the absence of facts to make a determination based on the two-stage enquiry, I am of the respectful view that this ties the hands of the Court. For that reason, to automatically make a declaration will mean that the Constitutional confirmation is without merit on the facts of this matter and likely to amount to wastage of Court scarce resources. In the event that I am incorrect in holding the view on the second reason, I reiterate that on the basis of the first reason it is not proper to accede to the request for invalidity.

[21] This does not mean that in a case where the presumption finds application that such a declaration will not be made. To sum up- on the contention by the Counsels that our Court have ruled against a presumption that places a legal burden on an accused to be unconstitutional therefore this court must make an automatic declaration of invalidity of section 19 (2) of DDTA is not prudent for the reasons stated above.

[22] In regard to the second ground of appeal Counsel for the Second Respondent contends that the trial court should have altered the plea in accordance with the provisions of Section 113 of the CPA as the Appellant had no intention to deal in drugs.

[23] Section 113 of the CPA provides-

'(1). If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to

the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

[24] The Appellant has made these material admissions¹¹–

- (a) That he pleads guilty freely, voluntarily and without any undue influence while in his sound and sober minds.
- (b) He was handed drugs by his girlfriend on 11 October 2014 which were contained in a plastic bag.
- (c) The plastic bag fell on the floor and he stepped on top of the drugs which alerted guards.
- (d) The correctional officer asked him to lift his leg and he resisted. Back -up was called and the drugs were discovered.
- (e) He was charged for dealing in drugs.
- (f) The drugs were correctly analysed without tampering.
- (g) He admits to the correctness of the certificate of analysis.
- (h) He was in possession of 0.41 grams of heroin and 18 tablets of mandrax.
- (i) He knew that his actions were unlawful and punishable by law.
- (j) He wanted to smoke the drugs.

[25] The record reflects that the admission that the Appellant wanted to smoke the drugs was prompted by a question by the court –

Court: *Alright, you admit the contents of the statement?*

Accused: *Yes Your Worship, I confirm I wanted to smoke the drugs Your Worship.*

Court: *Alright, then it means that there is not enough...there is no ...Ms Mafuko, maybe is there anything you would like to say in that regard.'*

[26] As it is evident from this exchange between the Appellant and the Court that the Court a quo entertained some doubt following the indication by the Appellant that he wanted to smoke the drugs. This in my view does not amount to an unequivocal admission of all the elements of the crime.¹² As soon as there is some doubt, the provisions of section 113 of the CPA are peremptory in that the court shall record the plea of not guilty.

¹¹ In the list of admissions, I have opted not to include the admission pertaining to the presumption of dealing as it was incorrectly admitted.

¹² See *S v Naidoo* 1985(2) SA 32 (N) at 37G-H it was held that a court before it can convict an accused it has to be satisfied on the facts stated by the accused that the accused is indeed guilty and the court has to pass judgment on the reliability of the admissions.

[27] Counsels correctly contend in my view that that there was a misdirection on the part of the Court a quo when it found that the Appellant admitted all the essential elements of the offence of dealing. Simply put, the record shows that the Appellant essentially was not admitting to the charge of dealing in drugs. The proceedings are vitiated by two acts of misdirection- the incorrect use of section 19 (2) of DDTA and the failure by the Court a quo to recognise the intention of possession rather than dealing. It follows that such the misdirection permits a consideration of all the facts.

[28] To sum up- the Appellant did not admit to the necessary intention to deal in drugs which is an integral part of the elements of dealing in drugs. It is now trite that criminal proceedings should be handled in accordance with justice and substantive fairness which affects the right of a fair trial.¹³ The Court a quo was under duty to record a plea of not guilty in terms of section 113 of the CPA and it erred when it failed to acknowledge the intention expressed by the Appellant for the possession of the drugs. This failure to record a plea of not guilty constitutes a misdirection entitling this court to set aside the conviction for dealing in drugs in contravention of section 5 of the DDTA.

[29] Based on the admissions by the Appellant, I am satisfied that the correct offence is for possession of drugs in contravention of section 4 (b) of the DDTA. I am of the view that the admission made by the Appellant that he tried to hide the drugs under his leg/foot and it required correctional officers to lift the leg thereby revealing the drugs is sufficient to infer all the elements of possession and unlawfulness.¹⁴

[30] The last aspect of whether or not the sentence of six years imposed by the Court a quo is appropriate for possession of drugs. Counsel for the Appellant contends that the Court a quo was aware that the Appellant was serving a sentence of 23 (twenty- three) years when it imposed the 6 (six) years imprisonment. The submission is that the cumulatively effect is that the Appellant will be in prison for a total of 35 (thirty- five) years. Counsel places reliance to the case of **S v Skenjana 1985 (3) SA 51 (A)** in which the Appeal Court interfered with the trial Court's refusal to order concurrency of the sentence. Counsel contends that the interest of justice will be served by a sentence of 29 (twenty-nine) years as opposed to 35 (thirty -five) years imprisonment and such a sentence is blended with mercy.

¹³ See *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC) at para [9].

¹⁴ See *S v Adams* [1986] 2 All SA 602 (A) para [14].

[31] The contention by Counsel for the First Respondent on sentence is that the personal circumstances of the Appellant were placed on record including his previous convictions. Counsel submits that the essential inquiry in an appeal against sentence is whether the Court exercised its discretion properly and judicially. Reference is made to the case of **S v Pillay 1977 (4) SA 531 (A)** at 535E-F. The contention by Counsel is that a message must be made that smuggling drugs in prison will not be tolerated. Counsel agrees with the views expressed by the Court a quo on concurrency and argues that there is no basis to interfere with the sentence. Counsel for the Second Respondent had no submissions to make in respect of sentence.

[32] It is trite that the determination of a sentence is pre-eminently a matter for the discretion of the trial court and in the exercise of the discretion it has a wide discretion in deciding which factors should be allowed to influence the court.¹⁵ It is further trite that a Court of Appeal will not be entitled to interfere with the sentence imposed unless it is satisfied that such a sentence was disturbingly inappropriate.¹⁶

[33] In **S v Rabie 1975 (4) SA 855 (A)** at 857D-F it was held-

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-

(a) Should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and

(b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

[34] I am of the view that the Court a quo misdirected itself by not considering the harsh effect of the sentence imposed in not making an order for concurrency. See **Furlong v S 2012 (2) SACR 620 (SCA)** para [9]. This constitutes a material misdirection. Counsel for the first Respondent concedes that he agrees with the sentiments (on concurrency) expressed by the Court a quo during the proceedings for leave to appeal. The Court a quo made these remarks on record during the leave to appeal proceedings *"If you behave in a manner that you do not*

¹⁵ See **S v Kibido 1998 (2) SACR 213 (SA)** at 216G-J.

¹⁶ See **S v Romer 2011 (2) SACR153 (SCA)** para [22].

deserve to go home then you will have to die in prison, let it be." This gives a glimpse of the Learned Magistrate's attitude in refusing to order the concurrency of the sentence. This in my view constitutes a material misdirection and a failure to exercise the discretion judicially. For this reason, this court is empowered to interfere with the sentence and to reconsider it taking into account of all the relevant facts of this matter.

[35] When considering an appropriate sentence, I have taken account the triad consisting of the crime, the offender and the interest of society. I have also considered the general principles of punishment consisting of retribution, deterrence, prevention and rehabilitation. I have considered the aggravating and mitigating factors including the element of mercy. In regard to the crime, it is self-evident that the crime of possession of drugs is a serious offence. In addition to the nature of the crime itself, the circumstances under which this offence was committed makes it serious. The Appellant was in possession of drugs in a correctional centre in disregard to all the rules of the correctional centre. This is within the context that a correctional centre should be a place of rehabilitation and self-introspection yet the Appellant committed a crime in such a centre. Drug related crimes are prevalent in society which fact must be given weight. I have considered the quantities of the drugs found in possession of the Appellant as proportionate to the sentence.

[36] I have considered the Appellant's personal circumstances which are-

- (a) He is 30 years old.
- (b) He has two minor children.
- (c) He has previous convictions.
- (d) He is unmarried though engaged.
- (e) He is currently serving 23 years imprisonment and has been in custody since 30 April 2013.
- (f) After he was charged for the current offence, he was moved to a new correctional centre at Leeukop.
- (g) He passed grade 12 and has certificate in construction.

[37] It is in the interest of society that serious offences are appropriately punished. Society as a legitimate right to law and order. I have considered the foundational sentencing principle that 'punishment should fit the criminal, as well as the crime, be fair to society and be blended

with a measure of mercy.¹⁷ Mercy is the hallmark of civilised systems. Mercy has been described as 'Mercy means to a criminal court that justice must be done, but it must be done with compassion and humanity, not by rule of thumb and that a sentence must be assessed, not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation'.¹⁸ On the facts of this matter, I have strived for deterrence and rehabilitation. In the exercise of mercy, I am of the view that it is in the interest of justice to make an order that the sentence runs concurrently with the sentence that the Appellant is serving.

[38] In conclusion, in relation to the first ground of appeal, I am not persuaded that the facts of this matter justify a finding of unconstitutionality for the reasons stated above. In relation to the second ground of appeal, I am persuaded that the Court a quo misdirected itself in not proceeding in terms of Section 113 of the CPA and not considering the harsh effect of the sentence it imposed. It follows that the appeal succeeds in respect to both the conviction and sentence. The order for forfeiture of the drugs stands.

Order:

[39] In the circumstances the following order is made:

1. The appeal succeeds.
2. The conviction and sentence are set aside and replaced with the order that the Appellant is sentenced to five years imprisonment.
3. In terms of section 280 (2) of the CPA this sentence to run concurrently with any sentence that the Appellant is currently serving.
4. The 0,41 grams of diacetylmorphine (heroin) and 18 tablets of methaqualone (madrax) forfeited to the state in terms of section 25 (1) (a) (iii) of DDTA.


MNCUBE, AJ
ACTING JUDGE OF THE HIGH COURT

¹⁷ See *S v Moswathupa* 2012(1) SACR 259(SCA) page 261D.

¹⁸ *S v Nyambosi* 2009 (1) SACR 447(T) at 451E-F.

GAUTENG DIVISION, PRETORIA

I concur


MBONGWE, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

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Date of Hearing
Date of Judgment

: 24 October 2024
: 23 APRIL 2025