



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/17

In the matter between:

MICHAEL KLAAS

Applicant

and

THE STATE

Respondent

Neutral citation: *Klaas v S* [2018] ZACC 6

Coram: Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgment: Mhlantla J

Decided on: 15 March 2018

Summary: Criminal Appeal — Drugs and Drug Trafficking Act — sentence — drug dealing and drug manufacturing — market value of drugs not proven — minimum sentencing provisions not applicable — appeal on sentence upheld

ORDER

On appeal from the Supreme Court of Appeal:

1. The applications for condonation are granted.
2. Leave to appeal against conviction is refused.
3. Leave to appeal against sentence is granted.
4. The appeal against sentence succeeds.
5. The orders of the Supreme Court of Appeal and the High Court of South Africa, Gauteng Local Division, Johannesburg dismissing the appeal against sentence are set aside.
6. The sentence of 15 years' imprisonment imposed in respect of count 2 by the Regional Court, Alexandra, Gauteng is set aside.
7. The applicant is sentenced to a period of 12 years' imprisonment in respect of count 2.
8. The sentence imposed in respect of count 1 shall run concurrently with the sentence in respect of count 2.
9. The sentence in count 2 is antedated to 10 December 2013.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Theron J and Zondi AJ concurring)

Introduction

[1] This is an application for leave to appeal against the conviction of contravening section 5, read with sections 18 and 21, of the Drugs and Drug Trafficking Act¹ (Drugs Act) and the sentence of 15 years' imprisonment that the

¹ 140 of 1992.

Section 5 reads as follows:

“No person shall deal in—

(a) any dependence-producing substance; or

Regional Court, Alexandra, Gauteng (trial court) imposed on the applicant, Mr Michael Klaas.

Background

[2] On 11 June 2009, two members of the South African Police Service went to a house situated at 9 Lantana Street, Morningside, Johannesburg after receiving certain information relating to activities on the property. The house is owned by the applicant. Upon arrival, they found the applicant's adult son, three year old son and a domestic worker.

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- (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless—
 - (i) he has acquired or bought any such substance for medicinal purposes—
 - (aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
 - (bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or
 - (cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian, and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;
 - (ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;
 - (iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, transports, ships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or
 - (iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, ships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation.”

[3] In the presence of his son, the police officers conducted search and seizure operations on the premises. The applicant's nephew arrived whilst the police were conducting the search. The police found the following items: eight bags filled with 2 920 tablets, mops, pans and many bottles. The police discovered white powder underneath these bags. At the swimming pool area, a container filled with a wet muddy substance was found. In the main bedroom they found a bag of white powder and a scale inside the cupboard. In the dining room, a big book with documents and a chemistry book with hand-written formulas of how to make a drug known as methaqualone (also known as mandrax), were found. Other items which included two piles of brown powders and bottles with liquids were found inside the freezer and various containers filled with chemicals that smelled like acetone. A pair of gloves was found hanging over a bucket that contained methaqualone.

[4] As a result, the applicant's son and nephew were immediately arrested. The applicant was arrested months later in East London.

Litigation history

Regional Court

[5] The applicant, who is a retired pharmacologist, was charged with his son and nephew for contravening the provisions of the Drugs Act, in particular, section 5(b) thereof.² The charge sheet read as follows:

“That the accused is guilty of the offence of contravening the provisions of section (5)(b) read with sections 2, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992. (Read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997). Further read with section 90 of Act 51 of 1977.”³

² Section 5(b) of the Drugs Act above n 1.

³ The accused was charged with contravening this range of provisions, however he was only ultimately convicted of contravening sections 5(b) read with 18 and 21 of the Drugs Act.

[6] When the trial commenced, the applicant pleaded not guilty. The State adduced evidence relating to the discovery of the drugs, chemicals and equipment. The police officers who conducted the search and seizure operations testified. Warrant Officer Gerber testified that he and Sergeant Borman acted after receiving information that the house was used as a drug lab. They discovered a huge quantity of drugs. They established that the applicant, together with his son and nephew, stayed at the house. No explanation was provided for the stash of drugs found. The applicant's son and nephew stated that they were visiting the applicant and knew nothing about the drugs. The police ruled out the applicant's domestic worker as a suspect. They reported their discovery to Superintendent Ludich, who arrived at the scene. The applicant's son and nephew were thereafter arrested. The seized items were sent for analysis.

[7] Warrant Officer Feldman, the investigating officer, testified about the circumstances that led to the arrest of the applicant and how he was linked to the commission of the offences. The police had found some clothing as well as the applicant's identity document at the premises. The gloves found on the bucket with methaqualone and subsequently confiscated on the scene were positively matched with the DNA of the applicant. Furthermore, the documents with inscriptions and chemistry formulas that had been seized on the scene were also analysed. A handwriting expert concluded that he could not exclude the applicant as the author of these documents. Warrant Officer Feldman had also received information that the applicant had purchased chemicals from a place known as Glass World. He had received an invoice with the applicant's name. Warrant Officer Feldman could not find the applicant. He later established that the applicant had fled to East London where he was eventually arrested and brought back to Johannesburg.

[8] Superintendent Ludich testified that he had gone to the scene after receiving a report from the other police officers. He confirmed that, upon his arrival, the officers showed him the drugs and other equipment. It became clear to him that the premises were used to manufacture drugs. He provided an estimate of the value of the drugs,

chemicals and equipment used in the manufacture of the drugs to be about R18 000 000. He estimated the street value of a single tablet as being R65. However, he did not know the weight of the methaqualone drug and chemicals. He conceded that he could not provide the correct value and stated that the experts would have to provide the actual value of the drugs found.

[9] The State handed in an affidavit in terms of section 212(4)(a) of the Criminal Procedure Act,⁴ deposed to by Sergeant Matshivha, a forensic analyst. In his affidavit, he stated that he had analysed the items found in the house. These included 2 920 tablets. He concluded that most of the items contained methaqualone whilst the others contained methamphetamine. The other items were used during the manufacturing of the drugs. However, the forensic report did not provide the value of the drugs found.

[10] The applicant testified and denied any knowledge and involvement in the manufacturing of the drugs. He admitted ownership of the premises but denied staying there. He stated that the house was occupied by his nephew and the domestic

⁴ 51 of 1977. Section 212(4)(a) provides:

“Whenever any fact established by any examination or process requiring any skill—

- (i) in biology, chemistry, physics, astronomy, geography or geology;
- (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
- (iii) in computer science or in any discipline of engineering;
- (iv) in anatomy or in human behavioural sciences;
- (v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
- (vi) in ballistics, in the identification of fingerprints or body-prints or in the examination of disputed documents,

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.”

worker who took care of his minor son. He and his wife stayed at another property. He occasionally visited the premises to satisfy himself that all was well. His last visit to the house was a week before the police raid. He did not know where his major son, who was arrested at the scene, lived. The applicant further testified that he knew nothing about the chemicals, the drugs and the manufacturing of the drugs on his premises. He had heard about the raid a day after the event. However, he did nothing nor did he bother to contact the police as no-one told him that the police were looking for him.

[11] On 22 November 2013, the applicant and his co-accused were convicted of the unlawful manufacturing of drugs and of dealing in drugs. On 10 December 2013, the applicant was sentenced to five years' imprisonment in respect of count 1 and 15 years' imprisonment in respect of count 2. The sentence imposed in count 1 was ordered to run concurrently with the sentence imposed in respect of count 2. The Regional Court dismissed his application for leave to appeal against conviction and sentence.

High Court

[12] The applicant's petition in the High Court of South Africa, Gauteng Local Division, Johannesburg for leave to appeal against the convictions and sentence was dismissed.

Supreme Court of Appeal

[13] On 13 February 2015, an application for special leave to appeal against conviction and sentence was dismissed by the Supreme Court of Appeal. The applicant thereafter applied to the President of the Supreme Court of Appeal in terms of Section 17(2)(f) of the Superior Courts Act,⁵ for the reconsideration of his application. This was refused on 25 April 2016.

⁵ 10 of 2013.

In this Court

[14] The applicant now applies to this Court for leave to appeal. He also seeks an order condoning the late filing of the application. The application is opposed by the National Director of Public Prosecutions (NDPP).

Applicant's submissions

[15] The applicant submits that his right to privacy in terms of section 14 of the Constitution was infringed when his house was searched by the police in his absence and without a search warrant. The applicant, however, concedes that his major son was present during the search. Regarding the warrantless search, the applicant relies on *Kunjana*,⁶ which was decided after the events that led to the applicant's arrest. There, this Court declared a warrantless search under subsections 11(1)(a) and (g) of the Drugs Act⁷ to be unconstitutional. Whilst the applicant accepts that the order in *Kunjana* was not retrospective, he submits that this Court held that police officers should be wary of searching without a warrant.

[16] The applicant submits that the trial court relied on circumstantial evidence when it convicted him. He argues that the proved facts were not sufficient to convict him, in that the State could not prove that the tablets were manufactured at his house since a machine press to manufacture the tablets was not found there. The police

⁶ *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (2) SACR 473 (CC); 2016 (9) BCLR 1237 (CC) (*Kunjana*).

⁷ Subsections 11(1)(a) and (g) state as follows:

“A police official may—

- (a) if he has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time—
 - (i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found;
 - (ii) search any container or other thing in which any such substance, drug or property is suspected to be found;
- ...
- (g) seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act.”

officers conceded that this process may have been done elsewhere. Another factor was that if the drugs were manufactured in his house, these could have been manufactured in his absence since he did not stay there.

[17] The applicant submits that the trial court's judgment on conviction and sentence was insufficient to enable the Supreme Court of Appeal to properly determine the issues raised by him in the petition. Without the record, so the applicant submits, the Supreme Court of Appeal could not have conducted an adequate reappraisal of the case in accordance with his constitutional right "of appeal to, or review by, a higher court" under section 35(3)(o) of the Constitution.⁸

Respondent's submissions

[18] The respondent submits that the only issue during the trial was whether the applicant had knowledge of the items recovered and was involved in the manufacturing of the items recovered. The applicant's version at the trial was a denial of any knowledge of any of the drugs and equipment found at the property. The respondent further submits that the applicant's right to privacy was not infringed by the lack of a search warrant. Referring to the non-retrospective order in *Kunjana*,⁹ the respondent submits that during the search in 2009, the police had the authority to search without a warrant in terms of the section 11 of the Drugs Act as well as in terms of section 22 of the Criminal Procedure Act.¹⁰ The respondent submits that the

⁸ Section 35(3)(o) of the Constitution provides that:

"Every accused person has a right to a fair trial, which includes the right —
 . . .
 o) of appeal to, or review by, a higher court."

⁹ *Kunjana* above n 6 at para 47.2.

¹⁰ Section 22 reads as follows:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—
 (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
 (b) if he on reasonable grounds believes—
 (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

applicant was not residing on the property and was not present during the course of the search. His son and the domestic worker were present. The respondent further states that the applicant was called by the police but never came to the property.

[19] The respondent submits that the applicant's right to be presumed innocent was not violated. Furthermore, the State correctly relied upon circumstantial evidence to prove the guilt of the applicant beyond a reasonable doubt. The respondent avers that the trial court correctly found that manufacturing of drugs had been taking place at the applicant's home. The respondent further submits that the applicant, his son and their domestic worker were the only persons with access to the property. The applicant and his co-accused must have been aware of the drugs and equipment on the property. Therefore, from the high volumes of equipment and substance found on the property, the respondent contends that it could not have had recently been brought to the property without the knowledge of the applicant.

[20] This matter has been determined on the basis of written submissions and without oral argument. On 23 August 2017, the Chief Justice issued directions calling upon the parties to file short written submissions on sentence, and specifically whether the provisions of the Criminal Law Amendment Act¹¹ are applicable.

Leave to appeal

[21] For leave to appeal to be granted, a matter must raise a constitutional issue or an arguable point of law of general public importance which ought to be determined by this Court. In addition, it should be in the interests of justice for the Court to grant leave. This matter raises the constitutional issue of the right to a fair trial. The applicant also has reasonable prospects of success in relation to sentence. As a result, leave to appeal is granted.

(ii) that the delay in obtaining such warrant would defeat the object of the search."

¹¹ 105 of 1997.

Condonation

[22] The Supreme Court of Appeal order was issued on 25 April 2016 and the application was lodged in this Court on 6 March 2017. It was filed ten months late. The applicant's explanation is that upon receipt of the order from the President of the Supreme Court of Appeal, he was under the impression that no further steps could be taken as he had exhausted all his legal remedies. He did not approach the Legal Aid Board to seek legal advice on this aspect as he preferred instructing his own legal representative. However, because of financial constraints, he was unable to do so. The fact that he is incarcerated also proved to be a huge obstacle as he was unable to make the necessary arrangements and act timeously. He submits that there are reasonable prospects of success and therefore applies for condonation for the late filing of his application. The application is not opposed by the respondent.

[23] The applicant's explanation for the delay is unsatisfactory. He could have approached the Legal Aid Board but appears not to trust them. However, it has to be accepted that sentenced prisoners experience difficulties when attempting to lodge their applications timeously. Another factor to consider is whether it would be in the interests of justice for condonation to be granted. In *Brummer*, this Court explained:

“It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.”¹²

[24] In addition, there are reasonable prospects of success on sentence. Accordingly, it is in the interests of justice that condonation be granted.

¹² *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 at para 3.

[25] The respondent's opposing affidavit was filed on 24 March 2017 when it was due on 17 March 2017. Therefore the opposing affidavit was five days late. The deponent on behalf of the respondent states that he laboured under a mistaken belief that the respondent had to file its affidavit within 30 days of receipt of the application. Once they became aware of the true position, they acted with haste and prepared the documents. This explanation is unsatisfactory, more so since it is from a person with a legal background. However, the delay is not unduly long and is reasonable. Furthermore, no prejudice will be suffered by the applicant if condonation is granted. Therefore, the late filing of the answering affidavit should be condoned.

Merits of conviction

[26] We are satisfied that the applicant was correctly convicted. The applicant, who is a pharmacologist retired because of ill-health, wants this Court to believe that the information and instructions found in a chemistry book on how to manufacture chemicals were used by him in his profession as a pharmacologist when it is common cause that he was no longer working. His defence during the trial was a bare denial. He tried to distance himself from the house and denied staying there, stating that he and his wife had marital problems, and that during 2009 he had stayed with her in Fourways while attempting to fix their marriage. He occasionally visited to ensure that all was well. His last visit to the house was a week before the drugs were found, allegedly to fetch some clothes, but he claimed not to notice anything untoward at the premises. The police seized huge quantities of drugs, chemicals and equipment. It is highly improbable that the applicant would not have known about the activities at his premises when regard is had to the type of operation conducted there and his close relation to those he said were the sole occupants. He appeared to implicate his son and nephew because they were the occupants of the house whilst he alleged that he only visited the house occasionally. In our view, the evidence against the applicant is overwhelming. The factual findings of the trial court cannot be faulted. His application for leave to appeal against the conviction must fail.

[27] However, that cannot be said about sentence. The applicant does not appear to have had a fair trial during the sentencing stage. In terms of the Criminal Law Amendment Act, a minimum sentence of 15 years' imprisonment is applicable for any offence referred to in Part II of Schedule 2.¹³ This schedule relates to any offence referred to in section 13(f) of the Drugs Act if it is proved that—

- “(a) [t]he value of the dependence producing substance is more than R50 000; [or]
- (b) [t]he value of the dependence producing substance is more than R10 000; and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.”

[28] The provisions of the minimum sentence legislation had been brought to the attention of the applicant when he tendered his plea. However, the State did not present evidence to prove the market value of the drugs seized at the applicant's property before conviction in order for the minimum sentencing legislation to be applicable. At the commencement of the judgment on the merits, the Magistrate stated that the accused was charged with a contravention of the Drugs Act, but did not mention that the provisions of the Criminal Law Amendment Act were applicable.

[29] Before sentence, none of the counsel addressed the trial court on the applicability of the minimum sentence legislation and if so, whether substantial and compelling circumstances existed for the imposition of a lesser sentence. The prosecutor in her brief address sought a sentence of direct imprisonment. Counsel for

¹³ Section 51(2) of the Criminal Law Amendment Act reads as follows:

“Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in:

- (a) Part II of Schedule 2, in the case of—
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.”

the applicant, whilst conceding the seriousness of the offences, urged the trial court to impose a heavy fine coupled with a long term of imprisonment which would be wholly suspended. This is another indication that the parties believed that the minimum sentence legislation was not applicable. At no stage did the trial court ask counsel to address it on the applicability of the minimum sentence.

[30] Yet the Magistrate in the judgment on sentence for the first time stated that the minimum sentence was applicable in respect of count 2. After considering the relevant factors, the Magistrate concluded that there were no substantial and compelling circumstances and accordingly imposed the sentence of 15 years' imprisonment in terms of section 51(2) of the Criminal Law Amendment Act.

[31] There are specific principles in relation to minimum sentencing for drug related offences. These principles were set out by the Supreme Court of Appeal in *Legoa*, where the Court examined the meaning of the word "value" in the context of minimum sentencing provisions for drug-related offences and assessed whether the State can prove the value of the relevant drugs after conviction.¹⁴ The Supreme Court of Appeal held that "value" in the minimum sentencing legislation should refer to market value, "the price a willing buyer pays a willing seller in an open market".¹⁵ In relation to the second issue, the Court held that it was necessary for the State to ascertain the value of drugs in question at the conviction phase in order for minimum sentencing legislation to be invoked.¹⁶

[32] In *Sithole*, the Supreme Court of Appeal applied the principle set out in *Legoa*, where it said:

"For a minimum sentence to apply to an individual drug dealer acting alone who is not a law enforcement officer, the contraband must exceed R50 000 in 'value'. The

¹⁴ *S v Legoa* [2002] ZASCA 122; [2002] 4 All SA 373 (SCA) (*Legoa*) at para 10.

¹⁵ *Id* at paras 10-11.

¹⁶ *Id* at paras 13-14.

legislature specified a monetary figure, and not a weight, presumably because illegal drugs vary so greatly in value. A car-load of dagga may be worth less than a small packet of heroin or cocaine. But this entails that the State must prove the value of the contraband seized – a more exacting task than proving its weight. And it must prove value not by showing a notional or abstract or potential value, but the value of the drugs *to the dealer*, whether at the place of seizure, or at the dealer’s intended point of sale. This has particular practical relevance when drugs in large volume are seized.”¹⁷

[33] In *Umeh*, the High Court applied the principle in *Legoa*, stating that “‘value’ in the minimum sentencing legislation means ‘market value’. To determine such value, a court being asked to apply the minimum sentence should establish what could be obtained for the thing in question”.¹⁸

[34] In this Court, the respondent conceded that there was no reference in the trial court’s judgment to the market value of the drugs. This aspect could not be ascertained from the evidence of the investigating officer. As already indicated, Superintendent Ludich did not know and merely provided an estimate of the value of the drugs and all the items seized to be in the region of R18 000 000. As far as he was concerned, the actual value had to be provided by the experts. However, this evidence was not adduced.

[35] Much as the provisions of the minimum sentence legislation were brought to the attention of the applicant when he pleaded, the respondent had a duty to prove the value of the drugs before conviction stage. It omitted to do so or adduce evidence in that regard. The main reason that the trial court could not apply the minimum sentence was not because the applicant had not been informed of the minimum sentence but because the market value of the drugs had not been proven before conviction as required by the Criminal Law Amendment Act. In order for the minimum sentence set out in Part II of Schedule 2 of the Criminal Law Amendment

¹⁷ *S v Sithole* [2004] ZASCA 77; 2005 (2) SACR 504 (SCA) at para 12.

¹⁸ *Umeh v S* [2015] ZAWCHC 81; 2015 (2) SACR 395 (WCC) at para 61.

Act to apply, the State would have had to have proven that the value of the drugs was greater than R50 000. An estimate of the value is not sufficient. Therefore, the jurisdictional fact entitling the trial court to impose the minimum sentence was absent. This results in an irregularity in so far as sentence is concerned. The trial court misdirected itself in imposing that sentence. This Court is thus entitled to interfere with sentence and reconsider sentence afresh.

Sentence

[36] In considering an appropriate sentence, we have to take into account the applicant's personal circumstances, the mitigating and aggravating circumstances, as well as the interests of society.

[37] Mitigating circumstances include that the applicant is a first offender and is 58 years old. He has to date served four years of his sentence.

[38] Aggravating circumstances include that the applicant has been convicted of serious offences. He used his skill of being a pharmacologist to manufacture drugs. He used his home as a laboratory and in the process exposed his minor son to the hazardous chemicals. A large quantity of drugs – 2 920 tablets – was seized. These drugs would have been sold to the community if the police had not been alerted to this enterprise. This would have had devastating effects on the community. The applicant showed no remorse for his actions. He distanced himself from the commission of the offences.

[39] We also have to bear in mind the penal provision set out in section 17(e) of the Drugs Act.¹⁹ This relates to the penalty for a contravention of section 5(b) of the Act,

¹⁹ Section 17(e) reads as follows:

“Any person who is convicted of an offence under this Act shall be liable—

...

(e) in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.”

and provides that a magistrate can impose a fine or imprisonment not exceeding a sentence of 25 years, or both. The respondent submitted that, from the facts of this case, a sentence of 5 years' imprisonment in respect of the manufacturing conviction and a sentence of 15 years' imprisonment in respect of the conviction for dealing in drugs, running concurrently, is reasonable and is not shockingly inappropriate.

[40] It is apposite at this stage to consider the sentences imposed by the courts in cases of this nature. In *Keyser*,²⁰ the Supreme Court of Appeal imposed a sentence of 20 years' imprisonment for the dealing of drugs. The Court acknowledged that the sentence was "undoubtedly a heavy one", but stated that the sentence was warranted in the light of the quantity of drugs carried by the applicant, which had a street value of well over R2 000 000. The Court held that the quantity of drugs directly corresponded to the number of lives potentially affected by the drug, and that that consideration alone far outweighed any of his personal circumstances and justified a long incarceration.²¹

[41] In *Umeh*, a case in which the market value of drugs had also not been proven, the court nonetheless imposed an effective term of 15 years' imprisonment for the dealing of crack cocaine and methamphetamine. In that case, the accused was a first time offender and a father of two children.

[42] In *Oha*,²² the accused, a married couple, were initially each sentenced to 25 years imprisonment for contravening section 5(b) of the Drugs Act. However on appeal their sentences were reduced from 25 years to 12 years and 10 years respectively, on the basis that the couple had two minor children who would be prejudiced by the extended incarceration of both of their parents.

²⁰ *Keyser v S* [2012] ZASCA 70; 2012 (2) SACR 437 (SCA).

²¹ *Id* at para 30.

²² *Oha v S* [2015] ZAGPPHC 276.

[43] In *Mandlozi*,²³ the High Court also highlighted the relevance of the quantity of the drugs possessed by the accused to sentencing. In addition, the Court pointed to the fact that drug manufacturing should carry a serious sentence stating that “very serious sentences such as the one imposed on the appellant should . . . generally and sparingly be reserved for drug manufacturers, suppliers and repeat offenders.”²⁴ The appellant was sentenced to 18 years’ imprisonment of which four years were suspended for five years on condition that the appellant was not again found guilty of contravening section 5(b) of the Drugs Act during the period of suspension.

[44] In *Windvogel*,²⁵ the Supreme Court of Appeal sentenced the appellant to an effective period of 20 years’ imprisonment for dealing in cocaine.

[45] In *Gamede*,²⁶ the accused were charged with contravening section 5(b) of the Drugs Act by dealing in 556 kilograms of methaqualone during June 2004. They were also convicted of manufacturing the drug. The accused were sentenced to 20 years’ imprisonment in the court *a quo*. The Supreme Court of Appeal saw fit to reduce the sentence of the first appellant to five years on the basis that the evidence showed that she did not have a major role in the manufacturing operation, however the court only reduced the sentence of the second appellant to 15 years’ imprisonment, since it was clear that he was directly involved in the manufacturing process. The second appellant was a 40 year old first offender.

[46] These cases make it clear that our courts have deemed sentences of imprisonment of ten years or longer to be appropriate for convictions relating to the manufacturing of and dealing in dangerous drugs. In my view, the applicant’s personal circumstances pale into relative insignificance when regard is had to the seriousness of the offences and the need to protect the public. It is common cause that

²³ *Mandlozi v S* [2014] ZAFSHC 106; 2015 (2) SACR 258 (FB).

²⁴ *Id* at para 35.

²⁵ *Johannes Windvogel v The State* [2015] ZASCA 63 (*Windvogel*).

²⁶ *Gamede v S* [2010] ZASCA 122.

the value and weight of the drugs were not proved, but 2 920 tablets were seized. It has to be accepted that the applicant did not only deal in drugs but also manufactured them. Even without evidence of the precise value of the drugs seized, this quantity of tablets had the potential to affect the lives of many people. In *Umeh*, the Court stated that “[i]t is in cases like these that the interest of society demands a harsh sentence in order to be protected” from the impact of drug dealing.²⁷ Only a sentence of long term imprisonment is called for. Therefore the appropriate sentence to be imposed in the circumstances of this case is 12 years’ imprisonment. Having regard to the advanced age of the applicant, it will be in the interests of justice that the sentence imposed by the trial court on count 1 run concurrently with the sentence on count 2. Therefore the effective sentence will be 12 years’ imprisonment, which has to be antedated to 10 December 2013.

[47] In the result, the following order is made:

1. The applications for condonation are granted.
2. Leave to appeal against conviction is refused.
3. Leave to appeal against sentence is granted.
4. The appeal against sentence succeeds.
5. The orders of the Supreme Court of Appeal and High Court of South Africa, Gauteng Local Division, Johannesburg dismissing the appeal against sentence are set aside.
6. The sentence of 15 years’ imprisonment imposed in respect of count 2 by the Regional Court, Alexandra, Gauteng is set aside.
7. The applicant is sentenced to a period of 12 years’ imprisonment in respect of count 2.
8. The sentence imposed in respect of count 1 shall run concurrently with the sentence in respect of count 2.
9. The sentence in count 2 is antedated to 10 December 2013.

²⁷ *Umeh* above n 17 at para 68.

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