



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A121/2023

MAGISTRATE'S CASE NO: BRC 27/21

In the matter between:

MINKANA ELIZABETH MAKGOBO

Appellant

and

THE STATE

Respondent

Coram: Justice J Cloete *et* Acting Justice N Ralarala

Date of Appeal: 8 September 2023

Delivered: 8 September 2023

JUDGMENT

CLOETE J:

[1] This is an appeal against sentence granted on petition to this court. The appellant is the sole caregiver and biological mother of three minor children. On 24 September 2020 she was found in possession of mandrax tablets stored in a sealed box in her luggage after the bus in which she was travelling from Potchefstroom to Mossel Bay was intercepted by the South African Police just outside Beaufort West. The appellant, who after her first appearance was

released on bail, was charged in the Beaufort West Regional Court on one count of dealing in drugs and, accordingly, with the statutory offence of contravening s 5 read with sections 1, 13, 17, 25 and 64 of the Drugs and Drug Trafficking Act¹ (“DDTA”). The charge sheet reflects that the appellant was found in possession of 7 215 mandrax tablets with a street value of R360 750.

[2] On 19 July 2022, after numerous postponements, the trial commenced. The appellant pleaded guilty as charged. Her written plea explanation in terms of s 112 of the Criminal Procedure Act,² read out by her legal representative, was that she had been looking for work and a friend whom she had approached offered her the opportunity to transport, purportedly for a company called Herbal Life, one of its packages from Potchefstroom to Mossel Bay for which she would be paid R3 000. However just before she boarded the bus she was made aware by the person who handed the box to her that it contained mandrax tablets.

[3] She admitted the goods found in the Herbal Life box were drugs; they were correctly weighed, packed and sealed and sent for analysis, and she had no objection to the handing in of the s 212 affidavit³ (of Warrant Officer Mpandeni, a forensic analyst) who confirmed the number of tablets found in the appellant’s possession. However no evidence was led by the State to prove the street value of the drugs seized and accordingly, and although this was also set out in the charge sheet, the provisions of s 51(2)(a) read with Part II of Schedule 2 of the

¹ No 140 of 1992.

² No 51 of 1977.

³ I.e. s 212 of the Criminal Procedure Act.

Criminal Law Amendment Act⁴ did not apply. There was also no evidence before the trial court that the appellant was aware of the quantity of mandrax tablets in the box in her possession prior to her arrest. In her plea explanation the appellant further stated:

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I know what I did was wrong and punishable by a court of law and the consequences of pleading guilty. I am extremely sorry for my actions and have deep regret and remorse that is why I am pleading guilty and accept the fact that I must take responsibility for my actions. I have no intention to waste the court's time and I plead guilty herein in the hope that the Court will consider this a mitigating factor when handing down sentence against me. I herewith place full confidence in our Criminal Justice system by playing open cards with the Honourable court and trust that the Honourable court will deal with me accordingly.

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In mitigation I place before the court, my personal circumstances namely that I did not waste the court's time herein and chose to plea on the offence. I am 31 years old and have no pending cases. I am unemployed and have 3 children age 12 years, 8 years, 4 years old and as well as an elderly mother whom I maintain.

I pray the Court will have mercy on me when handing down sentence.'

- [4] The State accepted the plea and the magistrate duly convicted the appellant as charged. No previous convictions were proven and the appellant's legal representative thereafter addressed the magistrate in mitigation. He informed her that the appellant was the sole breadwinner of her children and elderly ill mother who, it appears from the record, all resided with the appellant in Shoshanguve,

⁴ No 105 of 1997.

which is situated about 30km north of Pretoria. She explained the reason why she committed the offence was that *'(t)he wolf was at the door, I did not have much of a choice, there was no food on the table and we were struggling, really struggling to survive'*.

[5] It was also placed on record (and similarly not disputed by the State) that the children's father had abandoned them 3 years earlier; the appellant had only been able to secure intermittent employment as a domestic worker; and that, of the appellant's two siblings, her elder brother disappeared in 2012 and her 18 year old sister lived elsewhere with her boyfriend.

[6] It was therefore appropriate for the appellant's legal representative to request a pre-sentence report but alarmingly this request was simply ignored by the magistrate who, without any forewarning, took it upon herself to declare that the children would have to be removed immediately from the appellant's care, purportedly in terms of s 47 of the Children's Act⁵ and on the entirely erroneous ground that the appellant had exposed the children to danger by dealing in drugs in her own home. She stated:

'...social workers in Shoshanguve will have to immediately, in terms of section 191 remove those children immediately. Urgent removal has to be done. I am going to make that order... I will postpone for the social workers so that if they need to question her, they can do so, they can get the addresses and everything, the contacts for those people so that they can take those children immediately...'

⁵ No 38 of 2005.

- [7] In aggravation of sentence the prosecutor submitted that *'today we are dealing with a case of drug dealing with a street value of R360 000'*. There was simply no evidence before the trial court to support this. Nor was there any evidence to support the prosecutor's submission that *'it is a ruthless act to transport drugs of that calibre and that street value... with the known intention that it will hit the streets'* (my emphasis). The magistrate then proceeded to make an order in terms of s 47. When the appellant's legal representative requested that she be released on bail pending sentence the magistrate, without conducting any enquiry whatsoever, declared *'I can set out a bail for you, R20 000 is a bail'* and was unmoved when the appellant's legal representative informed her that *'I do not know where she is going to get that money from'*.
- [8] The magistrate then remanded the appellant into custody and postponed sentencing to 28 July 2022 in the Oudtshoorn Regional Court. In her judgment on sentence she repeated the same material error when referring to her earlier order that the children had been removed because the appellant was *'dealing in drugs in her own house where she has children'* and this is what had exposed them to danger and thus rendered them in need of care and protection.
- [9] While acknowledging that the appellant was a first offender who had pleaded guilty, and correctly stating that the offence was serious, the magistrate remarked *'[i]t seems that everyone... wants to prosper in the business of drugs'*. That the appellant had committed the offence because she wanted to *'prosper'* was simply not borne out by the evidence before the magistrate and, on its own, regrettably reflects the absence of an individualised approach to sentencing. Indeed, having

regard to the comments which followed, it seems that the overwhelming consideration in the magistrate's mind was the need for deterrence irrespective of the particular facts of the case.

[10] She then proceeded to find that a suspended sentence could not be considered given that a conviction of this nature carries a prescribed sentence in terms of s 17(e) of the DDTA. On appeal before us it was common cause that she erred in this regard. There is a long line of authority that although the aforementioned subsection provides that the court must impose a term of imprisonment, it does not preclude the total or partial suspension thereof.⁶ She sentenced the appellant to 16 years direct imprisonment.

[11] The grounds of appeal are that: (a) the magistrate's refusal to consider a possible suspension of the sentence was a material error of law; (b) the failure to accede to the defence request for a pre-sentencing report was a fundamental error; (c) the children's summary removal was unlawful and vitiated the sentencing proceedings; and (d) the term of direct imprisonment imposed was shockingly inappropriate.

[12] On the other hand the State submitted that: (a) since a sentence of correctional supervision was not an option there was no reason for the magistrate to obtain a pre-sentencing report; (b) given the magistrate's determination that a lengthy term of direct imprisonment was the only appropriate sentence, the appellant's

⁶ *S v Mqikela* 2005 (2) SACR 397 (ECD) at para [3], referring to *S v Van Zyl and Others* 1992 (2) SACR 101 (C); *S v Mazibuko* 1992 (2) SACR 320 (W) at 322j-323b; *S v Mohome* 1993 (1) SACR 504 (T); *S v Mosolotsane* 1993 (1) SACR 502 (O); *S v Baliso* 1991 (2) SACR 366 (T) at 369h-370b; *S v Zwane* 2004 (2) SACR 291 (N). See also *S v Gcoba* 2011 (2) SACR 231 (KZP).

three minor children were ‘*affected by*’ the proceedings and thus in need of care and protection as contemplated in s 47(1) of the Children’s Act, justifying an order for an investigation by a designated social worker as prescribed in s 155(2) of that Act; and (c) the consequences to the public at large of transportation of drugs, particularly of a quantity such as in the present case, should outweigh the personal circumstances of individuals such as the appellant.

[13] I have certain fundamental difficulties with the State’s submissions. First, s 155(1) of the Children’s Act prescribes that it is only a Children’s Court which can decide the question of whether a child who was the subject of proceedings in terms of, *inter alia*, s47 is in need of care and protection. The magistrate was not sitting as a Children’s Court and nor did she even hold any proceedings in terms of s 47 itself. Second, she ordered summary removal of the children before sentencing, and not as a consequence of the sentence she ultimately imposed. This is because, as I have said, she made a fundamental error of fact in finding that the appellant had been dealing in drugs in the home which she shared with the children.

[14] Third, I have been unable to find any authority that a pre-sentencing report – which is routinely called for by trial courts across the country when minor children are either involved or may be affected by the incarceration of an accused person – are nonetheless only required in those instances where a sentence of correctional supervision is an option. Not only was correctional supervision an

option⁷ but indeed, if such authority exists, it would not only offend against the paramountcy principle in relation to the best interests of minor children enshrined in s 28(2) of the Constitution, but would also go against the ambit of the duty of a sentencing court outlined by the Constitutional Court in *S v M*.⁸ In a nutshell:

'[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.'

[15] What is even more concerning is that the record is completely silent as to what, if any, feedback the magistrate obtained from the social workers which she took upon herself to direct obtain certain basic information concerning the children from the appellant. There is also nothing on the record to indicate if the children were summarily removed from their home and maternal grandmother just over 1 000km away and it is particularly aggravating that these are young children. We were informed during the appeal (by agreement between the parties) that the children have in fact not been removed and are currently still with their maternal grandmother, although they are largely having to fend for themselves. Fourth, given her material error of law, the magistrate did not even consider the partial suspension of the sentence she imposed. Put differently, in all the circumstances

⁷ *S v Van Dyk* 2005 (1) SACR 35 (SCA) at paras [12] to [13]; *S v Nel* 2013 (1) SACR 155 (GSJ) at paras [12] to [14].

⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) at paras [27] to [36].

of this case there was regrettably a grave miscarriage of justice, and the sentence must be set aside.

[16] The issue which then arises is whether the matter should be remitted to the lower court for sentencing proceedings to commence afresh or whether, as submitted on behalf of the appellant, this court should substitute that imposed by the magistrate with a suitable sentence. Upon careful consideration I have come to the conclusion that the latter option, in the particular circumstances of this case, is appropriate. In arriving at this conclusion I have taken into account the following: (a) the unlikelihood that the appellant will be able to afford bail given that she has been incarcerated for over a year; (b) the distance between her home in Shoshanguve and the lower court to which she will be required to travel for further court appearances with the attendant cost; and (c) the urgent need for the children to be returned to the appellant's care.

[17] During argument before the magistrate the prosecutor submitted that a sentence of 10 years direct imprisonment would be appropriate. Such a term appears to be in line with a number of decided cases to which we were referred and which acknowledge the gravity of offences in terms of the DDTA and the need to curb the scourge of our drug ridden society. However in my view, given the manner in which the proceedings were conducted in the lower court, and the exceptional circumstances which have been created as a result, coupled with the mitigating factors, to impose direct imprisonment for the full 10 year period would be to sacrifice the appellant on the altar of deterrence. It would rather be appropriate to suspend the balance of the period which the appellant has not already served.

[18] The following order is made:

1. The appeal succeeds and the sentence of 16 (sixteen) years direct imprisonment imposed by the court a quo is set aside;
2. The order of the court a quo, purportedly made in terms of section 47 of the Children's Act 38 of 2005, is set aside;
3. The sentence imposed by the court a quo is substituted with the following:

“The accused is sentenced to 10 (ten) years imprisonment of which 8 (eight) years and 11 (eleven) months is wholly suspended on condition that the accused is not convicted of any offence in terms of the Drugs and Drug Trafficking Act 140 of 1992 committed during the period of suspension”;

4. The sentence is antedated to 28 July 2022 in terms of section 282 of the Criminal Procedure Act 51 of 1977; and
5. The Head of the Correctional Facility in which the appellant is currently incarcerated is directed to procure her immediate release.

J I CLOETE

RALARALA AJ

I agree.

N RALARALA

For the appellant: Adv B Prinsloo

Instructed by: Mathewson Gess Inc. Attorneys (Mr B Mathewson)

For the respondent: Adv S Galloway