Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 02/2016

Date Heard: 02/11/2016

Date Delivered: 08/11/16

In the matter between:

PHUMELELA BREAKFAST **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NAIDU AJ:-

[1] The Appellant was convicted by the Adelaide Magistrate's Court of dealing in drugs. The Appellant was sentenced to 2 years' imprisonment of which 12 months' imprisonment was suspended for a period of 4 years. This appeal lies against the sentence imposed, with leave having been granted by the trial court.

[2] The Appellant made certain formal admissions in terms of section 220 of the Criminal Procedure Act, 1977 (Act No 51 of 1977). The Appellant admitted that on the 17th July 2015, and at 353 Remini location, in the district of Adelaide, she did unlawfully deal in an undesirable dependence producing substance as set out in Part 1 of Schedule 2 of the Drugs and Drugs Trafficking Act, 1992 (Act No 140 of 1992), to wit 32 straws of Tik.

[3] The trial court having regard to the issue of sentence had regard to the personal circumstances of the Appellant. In this regard the magistrate relied on the Pre-Sentence Report compiled by Miss N.T Lingela a probation officer at the Department of Social Development. Miss Lingela was of the view that the only appropriate sentence in the present circumstances was one of direct imprisonment.

[4] The magistrate duly considered that the Appellant was 27 years of age, unmarried with two minor children, the youngest child being 10 months old and the eldest child being 6 years old. The youngest child was in the care of the Appellant and the elder child was being cared for by a maternal aunt. The Appellant was also considered to be a first offender.

[5] The magistrate further duly considered the seriousness of the offence and the effects of drugs not only on society as a whole, but also in the court's area of jurisdiction in the Adelaide and Bedford region.

[6] Having regard to all of the above the trial court sentenced the Appellant to 2 years' imprisonment of which 12 months' imprisonment were suspended for a period of 4 years' on condition that the Appellant not be convicted of contravening Section 4(b) or 5(b) of Act 140 of 1992 committed during the period of suspension.

[7] In *S v Malgas* 2001 (1) SACR 469 (SCA) the court dealt with the approach to sentence by an appeal court, at paragraph [12]:

'' 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 the court of first instance and the sentence imposed by the trial court has no relevance. As it 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 emphasized 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.''

[8] Regard must also be had to the fact that the Appellant is the primary carer of her 10 month old child. In *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC), the court dealt with the question of the sentencing of a primary caregiver of minor children and of the protection of the fundamental rights of such children to parental care and the paramount importance of what would be in their best interests.

[9] Sachs J for the majority, set out the guidelines to assist courts to decide on sentence in such a way that the interests of the children of primary caregivers are properly considered. These guidelines are set out in paragraph 36 as follows:

> *''(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.*
>
> *(b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has*

reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal that adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is considered.

(c) If on the Zinn triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

[10] It is clear from the evidence that the Appellant is the primary caregiver of her 10 month old child. However having regard to the report of the probation officer regarding both the minor children herein, and the possibility of the minor children being exposed to the Appellant's criminal activities, the magistrate correctly in my view considered the circumstances of the children and ordered that a designated social worker investigate the circumstances of the children in terms of section 155(2) of the Children's Act, 2005 (Act No 38 of 2005).

[11] In my view the magistrate erred in not postponing the sentence of the Appellant until after a report from the social worker had been compiled and placed before the court regarding the circumstances of the children, thereby giving effect to the type of enquiry envisaged by Sachs J in *S v M* above, and accordingly must be seen as an irregularity, and is sufficient enough for this court to interfere.

[12] In the circumstances, the sentence imposed on the Appellant must be set aside. This court is not in a position to enquire as to the best interest of the Appellant's children. The matter must be remitted to the magistrate to make the necessary enquiries regarding the circumstances of the Appellant's minor children, where after a fresh sentence may be imposed.

[13] In the circumstances I make the following order:

(a) The appeal succeeds and the sentence imposed by the magistrate is set aside;

(b) The matter is referred back to the magistrate for him to sentence the appellant afresh after having regard to the social worker's report as to the circumstances of the minor children.

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V NAIDU
ACTING JUDGE OF THE HIGH COURT

BLOEM J: I AGREE.

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G H BLOEM
JUDGE OF THE HIGH COURT

Appearance for the Appellant:	**Ms NM Mazibukwana**
Instructed by:	**Grahamstown Justice Centre**
Appearance for the Respondent:	**Adv S Mgenge**
Instructed by:	**Director of Public Prosecution Grahamstown**
Date Heard:	**2 November 2016**
Date Delivered:	**8 November 2016**