IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

CASE NO: A323 / 2015

In the matter between:-

Abdullah, Adam Appellant

And

The State Respondent

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JUDGMENT

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SIBUYI, AJ:

[1] The appellant appeared in the Kempton Park Regional Court charged with one count of unlawfully dealing in a dangerous dependence-producing substance, that being 51 grams of cocaine in contravention of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, as amended.

[2] On 29 November 2012 the trial court sentenced the appellant to 14 years imprisonment. In terms of section 25 of the Drugs and Drug Trafficking Act, the drugs were declared as forfeited to the State and due to the automatic operation of section 103(1) of the Firearms Control Act, 60 of 2000, the appellant was declared unfit to possess a firearm. The appellant was legally represented throughout the trial.

[3] The appellant was subsequently granted leave to appeal against both his conviction and sentence.

[4] The Respondent filed a notice of intention to have the matter struck of the roll together with its heads of argument on the basis that the appellant filed no heads of argument on or before 19 February 2016 as required in the Notice of Set-Down issued on 24 November 2015, but instead filed the heads of argument on 14 March 2016; and that no application for condonation for the late filling of such heads has been brought by or on behalf of the appellant.

[5] In terms of Chapter 8 of the Practice Manual of this Court, specifically, paragraph 3 thereof: “Failure to file heads of arguments timeously will, as a general rule, only be condoned in exceptional circumstances. Error or oversight by counsel and legal representatives or latter’s employees will rarely be regarded as exceptional circumstances.”

[6] Counsel for the appellant explained the cause for the failure to file heads of argument in accordance with the Practice Manual. We are of the view that it is in the interest of justice that matters of this nature be brought to finality without delays. Hence, we condone the late filing of appellant's heads of argument.

[7] The State case against the appellant is that one customs officer, Inspector Kagiso Mogale ("Mogale"), was posted at carousel nine to monitor baggage. Carousel nine was only meant for baggage to South Africa. To his surprise he found appellant's bag on carousel nine. Appellant's bag was not supposed to be on carousel nine as the appellant was en route to Ghana.

[8] Mogale then requested one of his co-workers, Inspector Khoza, to go and look for the owner of the bag. Inspector Khoza went to look for the owner of the bag. He then came back with the appellant and the appellant confirmed that the bag belonged to him. Mogale asked the appellant to open the bag. The appellant took out his key and opened the bag.

[9] Mogale, in the presence of the appellant, searched the bag and discovered the drugs in question. When asked to explain the presence of the drugs in his bag, the appellant denied any knowledge of the drugs. Mogale called Sergeant Thiri, to the scene. Sergeant Thiri took over from Mogale, secured the evidence and arrested the appellant.

[10] The appellant denies that the drugs were found in his bag. He testified that he packed his bag and locked it with his key, which key he describes as a very special key. He was travelling from Sao-Paolo, Brazil, to Accra, in Ghana via Oliver Tambo International Airport.

[11] Inspector Khoza fetched him from the transit area and took him to an office where he found Mogale with his bag. When he arrived at the office, his bag, contrary to Mogale's version, was already opened. He specifically denied that the bag was opened with his key in his presence.

[12] The issue for decision in this matter is whether the State established the guilt of the appellant beyond reasonable doubt.

[13] It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true.

[14] If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it

can be said to be so improbable that it cannot reasonably possibly be true (see Olawale v S [2010] 1 All SA 451 (SCA), para 13).

[15] In evaluating the evidence against the appellant, one must look at the reliability and credibility of the State witnesses, consider if any of them had a motive to falsely implicate the appellant and further look at the probabilities of the State's version.

[16] The State's case rested on the evidence of a single witness as to the actual discovery of the drugs. The evidence of a single witness has to be clear and satisfactory in every material respect. The evidence has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is clear in every material respect.

[17] Before us, counsel for the appellant submitted that the trial court erred in not finding that the appellant's version is reasonably possibly true. The basis of the submission was that someone else other than the appellant must have brought appellant's bag to carousel nine. Counsel for the respondent supported the decision of the magistrate. He submitted that the evidence of Mogale on the discovery of the drugs was satisfactory in all material respects.

[18] I agree that the evidence of Mogale in regard to the actual discovery of the drugs is not corroborated. As was said in S v Gentle 2005 (1) SACR 420 (SCA) at para [18]: ". . . by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable on the issues in dispute."

[19] However, the evidence of the appellant may only be reasonably possibly true if one was to find that the customs official, Mogale, or and his colleagues, had a motive to implicate the appellant in the crime and having so devised a plan, framed the appellant accordingly.

[20] The circumstances of this matter are such that such conclusion cannot reasonably possibly be true. Firstly, there has to be a motive on the part of the custom officials to implicate the appellant. It is common cause that the appellant and the custom officials did not know each other prior the day of the incident.

[21] Further, no evidence of such motive was led during the trial nor can we reasonably infer such motive from the facts of this matter. Secondly, the planning and execution of such a sophisticated plan, on the face of the inherent probabilities in this matter, is not only highly improbable but so improbable that it cannot reasonably possibly be true.

[22] On the other hand, the evidence of Mogale was satisfactory in all material respects. Section 208 of Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. In S v Sauls and Others 1981 (3) SCR 172 (A) at 173, it was held that: “If a complainant was a single witness the further enquiry is whether she was credible. The evidence of a single witness must be clear and satisfactory in every material respect.”

[23] Although section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness, it has always been accepted that the evidence of a single witness must be viewed

with caution. A conviction should follow only if the evidence is substantially satisfactory in every material respect or if there is corroboration. The fact that the single witness occupies an official position, such as that of a police officer or traffic inspector, does not add weight to his evidence (S v Abrahams 1979 (1) SA 203 (A) at 207B–H). It has also been said that the statutory authority to convict an accused person on the evidence of a single witness ought not to be invoked where the witness has an interest or bias adverse to the accused (S v Mokoena 1932 OPD 79 at 80). The need for caution may also be increased by other factors such as the State's failure to adduce real evidence which should have been available (S v Msane 1977 (4) SA 758 (N)).

[24] The trial court in this case did, in its *ex tempore* judgment on conviction, mention the need for caution. It accordingly considered and applied the cautionary rule. The trial court was satisfied with the honesty and reliability of Mogale. I also find his evidence to be clear and satisfactory in every material respect. In my view, the appellant is guilty of offence. I can see no reason why this Court should interfere with the conviction.

AD SENTENCE

[24] Coming to the sentence, the evidence in this case is briefly outlined above. The personal circumstances of the appellant were that he was a first offender, married with two young children, and self-employed. Counsel for the state submitted that the finding of the Court *a quo* was justified on the basis of the credibility and factual findings it had made and that this court should not likely interfere with such findings (see also R v Dlumayo and Another, 1948 (2) SA 677 (A)). In my view, these submissions are tenable. A sentence should only be interfered with on appeal where: “(i) an irregularity has occurred; or (ii) the

trial court materially misdirected itself on the question of sentence; or (iii) the sentence could be described as so disturbing that it included a sense of shock."

[25] When it comes to the question of sentence one is immediately filled with apprehension and concern for the future of the appellant and the safety of others, the public.

[26] I found no irregularity, misdirection or that the sentence imposed can be described as being so disturbing that it induces a sense of shock. In imposing the sentence in the present case the magistrate is not shown to have ignored a relevant consideration or to have taken into account an improper consideration. He took into account the personal circumstances of the appellant, comparable sentences and cases. Therefore, the appeal against sentence must fail.

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

The appellant's appeal against his conviction and sentence is dismissed.

HW SIBUYI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree, and it is so ordered.

WHG VAN DER LINDE
JUDGE, HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| Counsel for the appellant: | Adv LS Tlake |
| Instructed by: | Legal Aid Board |
| For the respondents: | Adv R Ndou |
| Instructed by: | Office of the Director of public Prosecutions |
| Date of hearing: | 22 April 2016 |
| Date of Judgement: | 29 April 2016 |