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

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

2 November 2018

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APPEAL CASE NO: A166/2016
DPP REF:10/2/5/1 (2016/265)

In the matter between:

THE STATE

and

PHILLIP NSOFOR | **Accused / Appellant**

JUDGMENT

BEZUIDENHOUT AJ:

[1] This is an appeal against the sentences imposed on the Appellant in the Regional Court, Benoni on 17 October 2014. The appeal brings into focus sentencing principles regarding first-time offenders and the serving of concurrent sentences in terms of Section 280 of the Criminal Procedure Act 51 of 1977.

[2] The Appellant was sentenced to an effective thirty years imprisonment for the following offences:

[2.1] Count 2: Contravention of Section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998 for conducting or participating in an enterprise through a pattern of racketeering (racketeering) – twenty years imprisonment;

[2.2] Count 3: Contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that he dealt in 1529.19 grams of cocaine with a value of R764 595.00 (dealing in drugs) – twenty years imprisonment;

[2.3] Count 4: Contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that he dealt in 0.74 grams of methamphetamine, with a value of R300.00 (dealing in drugs) – ten years imprisonment;

[2.4] Count 5: Contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that he dealt in 80 tablets of methamphetamine and 20 tablets of methaqualone, with a total value of R4 000.00 (dealing in drugs) – ten years imprisonment;

[2.5] Count 6: Contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that he dealt in 0.45 grams of cocaine with a value of R500.00 (dealing in drugs) – ten years imprisonment;

[2.6] Count 7: Contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 in that he dealt in 6.50 grams of cocaine with a value of R6 000.00 (dealing in drugs) – ten years imprisonment;

[2.7] Count 8: Contravention of Section 49(6) of the Immigration Act 13 of 2002 – twelve months imprisonment.

[3] At the conclusion of the sentencing, the Trial Court ordered that the sentences on Counts 2, 3 and 8 run concurrently (twenty years imprisonment) and that the sentences on Counts 4, 5, 6 and 7, likewise, run concurrently (ten years imprisonment), the effective term of imprisonment therefore being thirty years.

[4] It is against this sentence that the Appellant, with leave from the Trial Court, contends before us that a lesser effective sentence of between ten to fifteen years imprisonment be imposed.

[5] The Appellant is a Nigerian citizen who entered the Republic of South Africa ("South Africa") on 28 May 2002 and when his Temporary Resident Permit expired in June of that year, he illegally remained in South Africa until his arrest on 26 November 2009. The trial ran for more than five years and the extent of the appeal record comprises more than three thousand pages. It is indicative of the effort to which the State went to pursue the conviction against the Appellant. During the appeal, Adv JA Badenhorst, who was the Prosecutor in the Trial Court, styled the trial as "*Hollywood-like*" traversing continents of the world and which ultimately resulted therein that the Appellant was convicted by the Trial Court and sentenced.

[6] The facts of the matter are indeed storybook-like mixed with intrigue and roleplay. It played itself out between events which took place in South Africa and ultimately, Brazil. In the period November 2004 to November 2009, the Appellant conducted and participated in a racketeering enterprise of drug dealing. Under the guise of a cell phone accessory outlet in Alberton, Gauteng, the Appellant operated a meaningful criminal enterprise. The evidence showed that he sold cocaine, ecstasy and other drugs, on numerous occasions, to drug users. In August 2005, he arranged for a drug user to travel to Argentina to secure cocaine. The drug deal in Argentina never materialised and the drug user returned to South Africa in August 2005. In October 2005, the same drug user travelled to Brazil where he was arrested with 4.8 kilograms of cocaine in his possession. He was subsequently convicted and sentenced to direct imprisonment in Sao Paolo.

[7] A Police Reservist in Alberton, who testified as a key witness in the Trial, befriended the Appellant over time, and was asked to perform unlawful favours for the Appellant. This included the losing of dockets and the planting of evidence to prosecute competing drug dealers. The Police Reservist ultimately infiltrated the enterprise of the Appellant over a period of one and a half years. The Appellant wanted to eliminate drug dealing competition in the Alberton area. The Appellant provided information on drug dealers in the area and at least three known drug dealers were arrested as a result of the information provided by the Appellant. The Police Reservist was involved in Counts 4, 5, 6 and 7. An official project was registered with the South African Police Service ("SAPS"), which ultimately resulted therein that authority was granted in terms of the provisions of Section 252-A of the Criminal Procedure Act 51 of 1977, so that law-enforcement could make use of traps and undercover operations to secure evidence so obtained.

[8] The enterprise of the Appellant gained momentum and in 2009, the Appellant, in an intricate scheme, arranged for another drug mule to travel to Brazil to collect cocaine which ultimately formed the subject matter of Count 3. The drug mule was a registered informant of the SAPS and travelled to Brazil to collect the cocaine. She was accompanied back to South Africa by officers of the Federal Police of Brazil. The informant would have been paid R60 000.00 to collect the cocaine from Brazil. The enterprise ran for approximately five years. Numerous drug mules were used to collect drugs from various countries, including Argentina, Brazil and Holland. The Appellant appeared untouchable and SAPS dockets incriminating him would disappear.

[9] The aggravating circumstances were therefore extensive.

[10] Supplementary Heads of Argument were filed by the Appellant on 10 October 2018 which was not pursued before us. Counsel appearing for the Appellant, Adv P Springveldt, during the hearing, also submitted Supplementary Heads of Argument in support of the Appeal. There was no objection from counsel for the State and these Heads of Argument were received. In the Supplementary Heads of Argument, it was contended that the Appeal against sentence should succeed and that all the counts against the Appellant should be taken together for the purposes of sentencing, and that a sentence of ten to fifteen years effective imprisonment should be imposed.

[11] Counsel for the Appellant, in essence, contended that the cumulative effect of the sentence of the Trial Court was unjust and that justice would have been served better if all the sentences were to have been ordered to run concurrently. The pivotal submission of the Appellant for this argument is that there was a close link between the offences and that the concurrent running of sentences will be appropriate.

[12] Sections 280(1) and (2) of the Criminal Procedure Act 51 of 1977, provides as follows:

> "***280 Cumulative or concurrent sentences***
>
> *(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.*

(2) *Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.*"

[13] Normally, multiple sentences of imprisonment are served one after the other unless a Court directs otherwise.

Section 39(2)(a) of the Correctional Service Act 111 of 1998 and S v Coetzer 2006 (2) SACR 63 (SCA)

[14] There is a very sound reason for Courts to consider the cumulative effect. Several sentences imposed in one Trial, should not be too severe in the light of aggregate sentences. On the other hand, the cumulative effect of sentences should not under-estimate the seriousness of offences.

S v Cele 1991 (2) SACR 246 (A) at 248-I to 249-A and S v Maraisana 1992(2) SACR 507 (A) at 511-G

[15] In the current instance, the Trial Court deemed it fit to order that the two sentences in Counts 2 and 3 of twenty years imprisonment each, run concurrently. We cannot fault the Trial Court for this as it is obvious that the events in Count 3, being the dealing in drugs which were imported from Brazil, were closely connected with the conviction on racketeering for Count 2. Moreover, the State is not appealing the Order of the Trial Court that these two sentences run concurrently.

[16] It is the second part of the Order of the Trial Court that the sentences of ten years imprisonment each for Counts 4 to 7, (i.e. forty years imprisonment in total), run concurrently, that is of concern.

[17] Counsel for the State, Adv Badenhorst, contends that a sentence of thirty years direct imprisonment, is "*in fact a very lenient sentence*" and that the appeal against the sentence, should be dismissed. On the principle of parity, Counsel submitted that in **S v Keyser 2012 (2) SACR 437 (SCA)**, the accused who was a drug mule and who brought 6.5 kilograms of cocaine into South Africa, was sentenced to twenty years direct imprisonment, which was confirmed on appeal. Whilst the drug mule was only the transporter, in the current instance, the Appellant was the "*kingpin*", Counsel submitted.

[18] It is common cause that the Appellant was arrested on 26 November 2009 and that he was sentenced on 12 December 2014. He was therefore incarcerated, awaiting trial, for more than five years. Time spent in prison before sentencing, must be taken into account. Counsel for the State conceded that the trial followed a smooth and continuous process until the Appellant was sentenced and that neither the State nor the Appellant could be held responsible for the delays during the postponements of the matter.

S v Gqamana 2001 (2) SACR 28 (C) at 37-G to 37-H and S v Vilakazi 2009 (1) SACR 552 (SCA) par [60] and Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others 2014 (2) SACR 337 (SCA) para [15] to [20]

[19] There is a further common cause fact that the Appellant was a first-time offender. That being common cause, the Appellant and the State disagree as to whether this should have been treated by the Trial Court as a mitigating fact.

[20] The Appellant contends that this should have been treated as a mitigating fact. Counsel for the State submits that based on the evidence of the drug expert, J Combrink, the fact that the Appellant does not have previous convictions, should not be seen as a mitigating factor, as it simply means that he had not been arrested for his wrongdoing by the time that the arrest took place in November 2009.

[21] The Trial Court seemed to have been persuaded by this submission. He reasoned, at 2025 (line 10 and further), as follows during the sentencing of the Appellant:

> *"I agree with the submission made by the Prosecution based on the evidence of Combrinck that in this matter, being a first offender should not attract any leniency from the Court looking at how cunning and premeditated the accused operated in the execution of his illegal activities as a whole.*
>
> *In our Law generally if one is a first time offender the Court is expected to be lenient. The case of S v Gulauti is clear in this regard that first offenders were* [sic] *possible must be treated much more leniently than a second and / or third offender.*
>
> *But for the purposes of this case the question is, is it appropriate to treat first offender like the accused with such leniency given the nature of the offence before this Court that drug kingpins or smugglers are untouchable and they do not often touch drugs with their own hands, chances of detecting them are very slim. Therefore the fact that they are first offenders should not attract any leniency on the part of the Court."*

[22] It appears to us that the Trial Court incorrectly reasoned that because drug kingpins or smugglers are cunning and pre-meditated and not easily detected, that when they are convicted they are not entitled to rely on the mitigating fact of being first-time offenders. The last sentence of the Magistrate's reasoning quoted above, indicates that he held the view that first-time offenders of this category should not attract any leniency as he put it.

[23] It is trite that being a first-time offender is considered a mitigating factor.

S v Van Wyk 1997 (1) SACR 345 (T) at 366-G to 366-H and S v Voges 1975 (3) SA 888 A at 890-E and S v Abt 1975 (3) SA 214 (A) at 219-H

[24] Being a first-time offender, does not mean that such a fact should override all the other principles to be considered during the sentencing process. First-time offenders are therefore not entitled to non-custodial sentences, merely because they are first-time offenders.

S v Victor 1970 (1) SA 427 (A) at 429-C to 429-D

[25] Is there a legal principle that when criminals are not easily detected, that they should be devoid from raising a mitigating fact of being first-time offenders, when they are ultimately prosecuted?

[26] In **S v Van Niekerk 1993 (1) SACR 482**, the court referred to an earlier Judgment which was also reported as **S v Van Niekerk 1981 (3) SA 239 (O) at 242-G to 242-H and particularly at 243-A**. In the latter Van Niekerk Judgment, Erasmus J appears to have drawn a distinction between two categories of "*first-time offenders*". Those that have never been convicted in a court of law and those that have not been convicted, but clearly have committed crime, and has not been sentenced by a court of law.

[27] It does not appear to us that the Van Niekerk Judgment has received any approval on this distinguishing feature of first-time offenders from any other Courts. In **S v Petkar 1988 (3) SA 571 (A) at 575**, the Appellate Division considered the Judgment of Erasmus J in the Van Niekerk Judgment, albeit on a different principle as to whether there is an obligation on a trial court, as a general principle, to investigate circumstances of crimes not charged in the indictment. The Petkar Judgment is accordingly no authority of the Appellate Division endorsing the distinction drawn between the two categories of "*first-time offenders*".

[28] We are of the view, that this distinction is artificial and cannot be supported. There is no halfway-house for, or two categories of, first-time offenders. A person who has not been sentenced by a court of law for criminal conduct will always be a first-time offender. The value of being a first-time offender should be considered by a trial court against the other factors under consideration during the sentencing process. To describe one category of a first-time offender as a "*onverbeterlike skurk*" (an insurmountable villain) and the other as a true "*first-time offender*", is in our view not helpful. First-time offenders should be so recognised from the factual question as to whether they have ever been sentenced by a court of law and if not, they are entitled to the mitigating fact of a "*first-time offender*".

[29] High Courts have wide powers in the consideration of an appeal on sentencing. The general principles which a court should consider in this process have been laid down long ago.

R v Dhlumayo 1948 (2) SA 677 (A)

[30] We can only interfere with the sentence of the Trial Court if the misdirection is of such a nature, degree or seriousness that directly, or by inference, it can be said that the court did not exercise its discretion at all, or exercised it improperly. Sentencing is pre-eminently a matter within the discretion of the Trial Court and that court has a wide discretion regarding the facts it takes into account and the relative value to be attached to them.

S v Giannoulis 1975 (4) SA 867 (A) and S v Rabie 1975 (4) SA 855 (A) and S v Fazzie & Others 1964 (4) SA 673 (A) at 684 A-B

[31] The Appellant was sentenced to a long period of imprisonment which the Trial Court arrived at by ordering that the sentences run concurrently. Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997, provides that there is a discretionary minimum sentence of fifteen years imprisonment, for a first-time offender for drug dealing, where the value is more than R50 000.00. The Trial Court imposed a sentence of twenty years imprisonment for Count 3 which demonstrates how serious the Trial Court viewed the offence.

[32] It is clear that the Trial Court reasoned that long-term imprisonment was the only appropriate sentence so as to remove the Appellant from the community.

[33] An effective imprisonment term of thirty years, must be treated as long-term imprisonment. Historically, twenty-five years of imprisonment has always been recognised as only to be imposed in exceptional circumstances.

S v Sibiya 1973 (2) SA 51 (A)

[34] In our view, the Trial Court misdirected itself materially in the following regards:

[34.1] we do not believe that a legal principle exists that certain categories of wrongdoers, i.e. "*kingpins*" or "*smugglers*" or persons who are not easily detectable, should as a matter of legal principle, be devoid from being treated as first-time offenders when they are convicted for the first time;

[34.2] all first-time offenders are entitled to the mitigating fact that they are first-time offenders, irrelevant of their styling as to where they fit into the category of wrongdoers. What weight should be given to the fact that they are first-time offenders in the bigger scheme of the sentencing process, lies in the discretion of the Trial Court when ultimately, consideration is given to all the criteria considered by the Trial Court in imposing a balanced sentence;

[34.3] Counts 4 to 7 attracted an equal sentence from the Trial Court of ten years imprisonment each, irrelevant of the quantity or the value of the drugs. In two of the counts, less than one gram of cocaine was dealt with by the Appellant. Counsel for the State conceded that there was no particular reason as to why ten years imprisonment was imposed by the Trial Court for each of these counts. In our view, they should have been sentenced individually, based on the quantity or value. Ten years imprisonment for Counts 4 and 6 in particular, is too heavy in our view.

[35] Whilst the Trial Court misdirected itself as to the first-time offender status of the Appellant, we do not find that the sentences imposed for Counts 2 and 3 of twenty years imprisonment each, were disproportionate. Racketeering and drug trafficking are both very serious offences. The Prevention of Organised Crime Act 121 of 1998 provides for life imprisonment upon conviction for racketeering. Racketeering is indeed a complex crime and as the facts in the current instance show, it involved group activity in which the Appellant played a major role in the running of the enterprise. The facts indicate that the enterprise operation was planned, ongoing and continuous

and that the enterprise stretched over a period of approximately five years until the Appellant was arrested. The State adduced evidence in terms of Section 2(2) of the Prevention of Organised Crime Act 121 of 1998 so that the Trial Court could hear evidence with regard to hear-say and similar facts on how the enterprise was conducted by the Appellant. The Trial Court correctly imposed a heavy sentence on the Appellant upon his conviction for racketeering. Heavy sentences for racketeering can mostly be expected from courts of law in view thereof that the criminal conduct of participants originate from their organised involvement in the enterprise which is regarded as more reprehensible and damaging to a society than a person who yields to temptation to commit crime.

S v Naryan 1998 (2) SACR 345 (W) 357 H-I

[36] It is obvious from the sentence that the Trial Court imposed for Count 2 was measured down to twenty years imprisonment, in view of the mitigating facts which the Trial Court considered. There is no appeal by the State that the sentence so imposed by the Trial Court was too lenient. Moreover, the State did not promote in the Trial Court that the matter should be transferred to the High Court for sentencing, in which it could have pursued life imprisonment.

[37] The State has therefore accepted that the sentence of twenty years imprisonment for racketeering is appropriate. We agree with that. The Appellant contended for an effective, cumulative sentence of between ten to fifteen years. That would have been totally inappropriate, given the facts of the matter and the seriousness of the convictions. Long-term imprisonment was indeed warranted in this matter.

[38] It is the cumulative effect of the two blocks of sentences that requires us to intervene only in the Order of the Trial Court as to the concurrency of the sentences to be served.

[39] As to Count 3, the value of the cocaine dealt with in the Count, exceeded R500 000.00. To that end, the minimum sentence of fifteen years provided for in terms of the Drugs and Drug Trafficking Act 140 of 1992, applied. We cannot fault the Trial Court for the sentence of twenty years imprisonment handed down for Count 3.

[40] The only remaining issue is whether, a sentence of ten years imprisonment for each of Counts 4 to 7, was too heavy and generalised. In our view, a sentence of two years imprisonment for each

of Counts 4 to 7, should have been imposed, totalling eight years imprisonment. Counts 4 to 7 all took place within 2009. These counts originated from the enterprise being infiltrated by the Police Reservist. The counts were closely linked with the enterprise.

[41] Count 8, being the conviction on the charge of contravening the Immigration Act 13 of 2002, goes back to 2002. It is not closely linked to the racketeering and drug trafficking convictions and it should be served separately. Persons who immigrate to South Africa must comply with immigration laws and upon expiry of their temporary permits, they must either return back to their countries of origin, or they must regularise their attendance in South Africa. There is no reason why the sentence for Count 8 should run concurrently with any one of the other sentences.

[42] Upon taking all the facts into account, the interests of society, the personal circumstances of the Appellant, the seriousness of the offences and the cumulative effect of the sentences imposed by the Trial Court, the following order is made:

[43] Order:

[43.1] The sentence of twenty years imprisonment for Count 2 for a contravention of Section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998, is confirmed.

[43.2] The sentence of twenty years imprisonment for Count 3 for a contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, is confirmed.

[43.3] The sentence of ten years imprisonment for Counts 4 to 7 for each contravention of Section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, is set aside and in each instance, replaced with a sentence of two years imprisonment on each count.

[43.4] The sentence of twelve months imprisonment for Count 8 for a contravention of Section 49(6) of the Immigration Act 13 of 2002, is confirmed.

[43.5] It is ordered in terms of Section 280(2) of the Criminal Procedure Act 51 of 1977, that the sentences for Counts 2 and 3 run concurrently and that half of the sentence on Counts 4 to 7, in other words four years, also run concurrently with the sentences of Counts 2 and 3.

[43.6] The effective imprisonment for the Appellant is therefore twenty-five years imprisonment.

[43.7] The sentence is antedated to 12 December 2014.

AP BEZUIDENHOUT
ACTING JUDGE OF THE HIGH COURT

I agree

L. WINDELL
JUDGE OF THE HIGH COURT

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Date of Hearing: 29 October 2018

Judgment Delivered: 2 November 2018