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

Case no: **A413/2010**

In the matter between:

LEONARDUS GROBLER BREEDT Appellant

v

THE STATE Respondent

JUDGMENT HANDED DOWN ON FRIDAY, 25 FEBRUARY 2011

CLEAVER J

[1] The appellant was convicted in the magistrates' court, Bellville of contravening section 5(b) of the Drugs and Drug Trafficking Act, No 140 of 1992 and was sentenced to eight years imprisonment of which four years were conditionally suspended. Although the appellant had been charged with dealing with cocaine on the basis that he had been in possession of four kilograms of cocaine, he was found guilty on the basis of being in possession of 120 units of cocaine weighing 582.32g.

[2] The appellant now appeals to this court against both the conviction and sentence.

[3] The facts giving rise to the appeal are not in dispute. All that is in dispute is that whether the evidence tendered, and taking into account that the defendant elected not to testify or to call any witnesses in his defence, was sufficient to justify the guilty verdict.

[4] When the appellant arrived back in Cape Town on a flight from Buenos Aires on 14 November 2005, he aroused the suspicion of Mr Combrinck ("Combrinck"), a Detective Inspector in the South African Police Services attached to the Organised Crime Investigating Unit in Cape Town. The appellant seemed nervous to Combrinck and when he did not answer certain questions satisfactorily, he was asked whether he had any drugs in his possession, which he denied. His baggage was then searched in accordance with the provisions of the Police Act and the Drugs Act, but no drugs were found. Combrinck then asked the appellant to accompany him to the Tygerberg Hospital as he had a suspicion that he might have ingested drugs and wished to have x-rays taken of him. Grobler then immediately admitted that he had ingested a quantity of cocaine 'bullets'. He was then warned of the charge against him, namely dealing in cocaine and his rights were explained to him. It would seem that the appellant tried to persuade Combrinck to accompany him to a certain hotel in order to meet a party whom he had been told to meet, but Combrinck was having none of this and insisted that he be taken to the Tygerberg Hospital where x-rays were taken of him. In cross-examination Combrinck explained that once the appellant was in his charge, he could not allow his health to be jeopardised by delaying the excretion of the bullets and insisted that steps be taken to ensure the excretion. The x-rays duly revealed possible cocaine bullets and in consequence thereof the appellant was booked into the Tygerberg hospital. After laxatives had been administered to him under medical supervision, he excreted a total of 120 bullets over the period 14 – 17 November 2005. Combrinck and two other police officials, namely Detective Inspector Steyn ("Steyn") and Captain Syali ("Syali"), shared successive shifts with the appellant during this period so that one of them was present with him at all times. All three gave evidence and testified as to the number of bullets which were excreted by the appellant during each shift. Steyn collected 40 bullets in

three shifts (33, 1 and 6 bullets in the respective shifts), with each bag being sealed with a unique reference number by him in the presence of the appellant at the conclusion of a shift. Syali took possession of 45 bullets in two shifts (33 in the first and 12 in the second) each of which he sealed with a unique reference number in the presence of the appellant at the conclusion of a shift and Combrinck took possession of 35 bullets in two sessions (32 in the first and 3 in the second) which he likewise sealed with unique reference numbers in the presence of the appellant at the conclusion of each shift. Combrinck testified that he received the sealed bags from the other two officers and booked these, together with his two sealed bags into the SAP 13 Exhibit Register at the Ravensmead Police Station. The bags were removed again by him on the same day and transferred to a safe in his offices to which only he had the key. On 23 November 2005 he removed the bags from the safe and delivered them in their sealed form to the forensic science laboratory at Delft.

[5] An affidavit in terms of s 212 (4)(a) and (8)(a) of the Criminal Procedure Act was handed in to and accepted by the court. It was deposed to by one Bonga Precious Mabula ("Mabula"), a sergeant in the South African Police Service attached to the chemistry unit of the forensic science laboratory as a forensic expert, in the service of the state. The relevant portion of his affidavit reads as follows:

> *"I during the performance of my official duties, on 2006-06-29 received seven (7) evidence bags with unique numbers FSCC-392733, FSCC-392747, FSCC-392748, FSCC-392731, FSB-479547, FSB-479546 and FSB-479548 respectively from the Administration Unit of this laboratory. The evidence bags were each marked inter alia 'Ravensmead mas 276/11/05 SAP 13/1270/05' and further marked respectively A, B, C, D, E, F and G by myself and contained the following:*
>
> *3.1 A- three (3) units of solid material each wrapped in plastic.*
>
> *3.2 B- six (6) units of solid material each wrapped in plastic.*

3.3 C- *one (1) of solid material wrapped in plastic.*

3.4 D- *thirty three (33) units of solid material each wrapped in plastic.*

3.5 E- *twelve (12) units of solid material each wrapped in plastic.*

3.6 F- *thirty three (33) units of solid material each wrapped in plastic.*

3.7 G- *thirty two (32) units of solid material each wrapped in plastic.*

Calculated on the average mass of one (1) unit, one hundred and twenty (120) units are equivalent to 582.32g

The seals were intact and broken by myself.

4.

I was requested to examine the exhibits in order to determine whether they contain any substances as listed in the Schedules of the Medicines and Related Substances Control Act, Act 101 of 1965 and/or the Drugs and Drug Trafficking Act, Act 140 of 1992.

5.

During the performance of my official duties, I analysed the exhibits with processes requiring skill in Chemistry. The following technique was used:

5.1 Coupled Gas Chromatography Mass Spectrometry (GC-MS). GC-MS is an internationally accepted analytical comparative technique where compounds in the gas phase are separated and a characteristic pattern (mass spectrum) of the separate compounds is obtained.

Instrumentation used during analysis of the above mentioned exhibits was properly calibrated.

6.

I compared the results to the reference material and determined that the exhibits contain cocaine. Cocaine is identical to one of the substances obtained from Coca leaves and is therefore listed in Part II of Schedule 2 of Act 140/92."

[6] The appellant elected not to testify and was thereafter found guilty as the regional magistrate was satisfied that the state's case had been proved beyond reasonable doubt.

[7] The grounds of appeal advanced before us stem in the main from criticisms of Combrinck's evidence. In his evidence, Combrinck, when explaining that he had collected the sealed bags from Steyn and Syali, furnished the unique numbers applied to these bags and

indicated how many bullets each bag contained. When he was recalled before the close of the state case at the request of the defence, it was pointed out to him that he had testified that the bag marked 479548 which he had collected from Steyn had 33 bullets in it and that he had testified that the bag in which he had collected 32 bullets also bore the number 479548. He conceded that his evidence in this respect must have been wrong and that he had made a mistake with the identifying numbers to which he had referred. Counsel also highlighted further criticisms relating to Combrinck's evidence, these being in respect of the affidavit which he had made recording his evidence and which had been made available to the defence. Although provision was made in the affidavit to record the number of bullets excreted by the appellant while in the company of himself, Steyn and Syali, the affidavit was not completed by inserting the number of bullets in the blank spaces which had been provided for this purpose. Even more surprising is that although the affidavit reflects that it was sworn to on 18 November 2005, it records that Combrinck handed the exhibits to the forensic laboratory at Delft on 23 November 2005. The affidavit was not relied on by the state, but was referred to and handed in as evidence by the defence in order to discredit Combrinck's evidence.

[8] Ultimately the submission by the appellant's counsel amounted to this: the chain of evidence linking the bullets collected from the appellant and received by Mabula was not sufficiently established in that

* Combrinck was not able in court properly to identify the evidence bags which he says he handed in to the Ravensmead Police Station and thereafter to the forensic laboratory at Delft.

* Combrinck could not say to whom he had handed the packages at Delft Laboratory.

Counsel submitted that since it does not appear from the record that Combrinck had his own notes or documentation available when he referred to the identifying numbers given to the exhibit bags, the indications are that the numbers to which he referred were obtained from Mabula's affidavit. For this reason it was submitted that Combrinck's evidence as to the identifying numbers of the bags was insufficient to establish the chain. There is however additional evidence which links the bags which Combrinck collected to the bags received and dealt with by Mabula. Combrinck testified very early in his evidence that he booked the seven evidence bags which had been obtained from the appellant into the SAP 13 Register at Ravensmead Police Station on 18 November 2005 under number 1270/2005. He also said that each seal was marked *"Ravensmead mas 276/11/2005"* and *"Ravensmead SAP 13/1270/2005"*. Counsel submitted that since Combrinck might have needed to refer to Mabula's report in order to establish the identifying numbers of the bags, he must similarly have had to refer to the report in order to obtain the SAP 13 reference number. In my view there is no basis for this submission. Combrinck's evidence is on record and stands. In my view the chain is completed as far as this portion of the argument goes by Mabula stating in his affidavit that he received seven evidence bags (with unique numbers) and that the evidence bags were each marked inter alia

> *"Ravensmead mas 276/11/2005 SAP 13/1270/2005"*.

[9] The second leg of the argument is that the chain was not established because Combrinck did not specify to whom he had delivered the bags when he handed them in to the forensic science laboratory on 23 November 2005.

The answer to this submission is to be found in the judgment of *S v Boyce*[1] in which it was held that where an analyst receives a marked and sealed packet in the same condition as in which it was sent, *"...dit nie van belang in wie se bewaring die geseëlde houer was vandat die monster geneem is totdat dit by die ontleder uitgekom het nie"*.[2]

A similar view was expressed in *S v De Leeu*[3], it being pointed out that it should always be borne in mind that the certificate in terms of s 212 is only prima facie evidence. Counsel sought to distinguish the facts in this case from those in *Boyce*'s case, highlighting the fact that in that case the holder which contained the needle used to draw blood from the accused was resealed with an identifying number after the needle had been returned to the holder and that number was then endorsed on a ticket. Combrinck testified that the forensic bag which they use contains a strip which is removed in order to open it and it would seem that the bag is thereafter sealed against the surface from which the strip has been removed. He said that if the bag is tampered with a *"void"* will be noticed it. I must confess that I do not understand why the difference in the bags used should alter the principle enunciated in *Boyce*'s case which was simply to the effect that the sealed packet received by the analyst must be in the same condition as it was when it was sent. In this case Combrinck testified that the bags were sealed after each session with the appellant and that the sealed bags were handed in to the SAP 13 Register.

[10] The following evidence was therefore before the court:

1. Combrinck collected seven sealed evidence bags containing bullets which had been excreted by the appellant, each with an identifying number and on 18 November 2005 these

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[1] 1990 (1) SACR 13 (T)
[2] *S v Boyce* (supra) at page 18c-d.
[3] 1990 (2) SACR 165 (NC).

bags were booked in to the SAP Register at the Ravensmead Police Station under number 1270/2005. The record indicates that the appellant was present when this was done. Combrinck testified that in addition to the identifying numbers, each bag was marked *"Ravensmead mas 276/11/2005 SAP 13/1270/2005"*.

2. On the same day the bags were booked out of the SAP 13 Register by Combrinck and placed in a safe in his office where they remained until he removed them from the safe and booked them into the forensic laboratory at Delft on 23 November 2005. During the time that the bags were kept in the safe, the only key to the safe was in Combrinck's possession.

3. The affidavit by Mabula reflects that he received seven evidence bags with unique numbers on them from the administration unit from his laboratory, each marked *"Ravensmead mas 276/11/05 SAP 13/1270/2005"*. The seals to these evidence bags were broken by himself and the bags were kept exclusively under his safekeeping by placing them under lock and key from 29 June 2006 to 6 July 2006 when his analysis of the contents was completed and his affidavit sworn to.

4. The affidavit complies with the requirements 212(8)(a)(i) and (ii)(aa).

[11] Counsel also submitted that because of the delay between the delivery of the evidence bags to the Delft laboratory on 23 November 2005 and them coming under the control of Mabula on 6 July 2006, a doubt exists as to the strength of the chain. In advancing this submission, he made reference to *S v Jantjies en 'n Ander*[4] in which it was noted that there had been no indication that there had been a substantial passage of time between the receipt and analysis of tablets found at the home of the accused. That alone is no basis for the submission that a lengthy period of time would affect the outcome of the analysis. At no

[4] 1993 (2) SACR 475 (A)

stage was there a suggestion that anything untoward had occurred as a result of the delay in examining the substance that would affect the results of the analysis.

[12] Combrinck's evidence that he had delivered seven sealed bags to the forensic laboratory was not disputed and the appellant did also not dispute the number of bullets which Combrinck, Syali and Steyn said they had collected from him and that they had sealed the bullets in the evidence bags n his presence.

[13] As to the s 212 affidavit, it was pointed out in *Van der Sandt*[5] that the section permits the court to call the deponent to the affidavit to testify viva voce and that a court which refuses a fair request by an accused to do so will put the outcome of the trial at risk. The appellant's legal representative could therefore have requested the regional magistrate to call the deponent to give evidence or he could of course have called an expert himself if he wished to challenge the evidence given by the deponent on oath.

[14] The finding recorded by Mabula in the s 212 affidavit is that the substance which he found in the sealed bags contained cocaine. In terms of s 212(4)(a) of the Criminal Procedure Act, the production of Mabula's affidavit is prima facie proof of the fact that the substance contained cocaine.

In *S v Veldthuizen*[6] it was made clear that the words 'prima facie evidence' cannot be brushed aside or minimised and in *S v Greeff*,[7] also a judgment of the Supreme Court of Appeal, Grosskopf JA said the following:

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[5] *S v Van der Sandt* 1997 (2) SACR 116 (WLD) at 132f-g.
[6] 1982 (3) SA 413 (A).
[7] 1995 (2) SACR 687 (A) at 687j-690a.

"Die vraag is nou of die appellant se skuld bo redelike twyfel bewys is. As die sertifikaat sy volle regskrag het ingevolge art 212(4)(a) *van die Strafproseswet, moet die antwoord bevestigend wees. (Sien* S v Veldthuizen *1982 (3) SA 413 (A) op 416*g-h.*) Die feit wat bewys moes word was dat die monster bloed nie minder nie as 0,80 gram per milliliter alcohol bevat het. Die sertifikaat voldoen aan al die formele vereistes om* prima facie *bewys te vorm dat die bloedkonsentrasie 0,27 gram per milliliter bloed was."*

[15] The absence of any evidence from the appellant converted the prima facie case against him to a case on which the magistrate correctly found that the state's case had been proved beyond reasonable doubt.

[16] The appellant's counsel did not seriously challenge the sentence which had been handed down by the regional magistrate, although heads of argument were provided in which it was submitted that having regard to the appellant's personal circumstances, the sentence imposed was shockingly inappropriate and a sentence in terms of s 276(1)(h) of the Criminal Procedure Act ought to have been be imposed.

[17] The test to be applied when dealing with an appeal against sentence is trite, namely whether there was a proper and reasonable exercise of the discretion bestowed on the court imposing a sentence.[8]

> *"Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not it is free to do so."*[9]

[18] It is clear from the judgment of the court a quo that full and careful consideration was given to all the relevant factors. These included the personal circumstances of the appellant,

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[8] *S v Pieters* 1987 (3) SA 717 (A) at 727G-I.
[9] *S v Kgosimore* 1999 (2) SACR 238 at 241g-h.

the fact that he had already spent a period in custody prior to the trial, a report from the correctional services official who recommended a sentence in terms of s 276(1)(h) and references to a number of appropriate judgments in which sentences for similar offences had been handed down. I might add that the attorney who appeared for the appellant at the sentencing stage presented an extremely full and competent address in mitigation of sentence.

[19] Unfortunately this case is affected by the lengthy delay which ensued between the time of the appellant's arrest in 2005 and the trial which took place in 2009. By the time the trial took place the appellant's personal circumstances had differed vastly from those which existed when he was arrested. Whereas he had been living a hand to mouth existence in 2005, he had by 2009 rehabilitated himself to a great extent and it could therefore be argued that such rehabilitation might be destroyed if a sentence of direct imprisonment is imposed. However, that fact was also taken into account by the court a quo.

[20] In the heads of argument submitted by counsel for the state, reference was made to the following extract from the judgment in *S v Jimenez*[10]

> *"There is no doubt that in the exercise of the sentencing discretion a court should have regard to public policy and the public interest. The expression of policy in a statute - as in the Criminal Law Amendment Act - is most certainly a factor that should be taken into account. Indeed, that statute shows the disquiet experienced by the public, represented through the Legislature, at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised. In an oft-cited* dictum *Rumpff JA said in S v Zinn 1969 (2) SA 537 (A) at 540G - H that what must be considered 'is the triad consisting of the*

[10] 2003 (1) SACR 507 (SCA) at 512 para 9.

crime, the offender and the interests of society'. The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act, which includes drug trafficking where the value of the drug exceeds a certain amount."

In *Jimenez* the appellant had also swallowed 60 'bullets' of cocaine and brought these in to the country by aeroplane. It was alleged that the weight of the cocaine was 653.4g and its value R210 000. The sentence of 12 years imposed on the appellant was confirmed on appeal.

[21] That an appeal court will not interfere with a sentence if it is satisfied that the trial court properly exercised its discretion when deciding on the sentence, even if the appeal court is of the view that correctional supervision is more appropriate than direct imprisonment was made clear in *S v W*[11].

[22] After considering all the relevant factors, the appellant's personal circumstances and the sentencing options open to him, the regional magistrate concluded that the seriousness of the offence and the interests of society outweighed the personal circumstances of the appellant and that direct imprisonment ought to be imposed. In recognising the change in the appellant's circumstances, he partially suspended the term of imprisonment.

[23] I am not persuaded that the sentence imposed by the trial court is not one which should reasonably have been imposed or that the discretion bestowed on the trial court was not judicially exercised. In the result the appeal against sentence must fail.

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[11] 1995 (1) SACR 606 at 609f-g.

[24] The appeals against both the conviction and sentence are dismissed and both the conviction of and the sentence imposed on the appellant are confirmed.

R B CLEAVER

KOEN AJ

I agree.

S J KOEN