IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No. : A56/2014

In the matter between:-

LINDIWE MANDLOZI Appellant

(LEOPOLDINA MACONZE)

and

THE STATE Respondent

CORAM: RAMPAI, AJP *et* MBHELE, AJ

HEARD ON: 9 JUNE 2014

JUDGMENT BY: RAMPAI, AJP

DELIVERED ON: 3 JULY 2014

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[1] These proceedings concern an appeal. The appellant, Lindiwe Mandlozi also known as Leopoldina Maconze, was sentenced to 18 years imprisonment. She now comes before us on appeal with the leave of this court granted on petition. The respondent opposes the appeal.

[2] The appellant was arrested on 1 August 2012 at Kroonstad. The charge against her was contravention of section 5(b)

Drugs and Drug Trafficking Act 140 of 1992 read with certain specified provisions thereof. The respondent alleged that the appellant was unlawfully dealing with 25,8885 kg of methamphetamine at Kroonstad on 1 August 2012. Methamphetamine is a drug. It is listed in Part III of Schedule 2 to the statute. It is a dependence producing substance. Its street name is “crystal meth” or “tik”. The respondent alleged in the charge sheet that the sale price of the drug found in the appellant’s possession, was approximately between R7,76 million and R10,3 million, in other words about R300,00 to R400,00 per gram.

[3] The appellant was tried in the Kroonstad Regional Court. On 9 April 2013 she pleaded not guilty before Mr I.R. Smith, the regional magistrate. She was legally represented by Mr Van Rensburg. Ms Claassens appeared for the respondent.

[4] Notwithstanding her plea, the appellant was convicted on the strength of the testimonies of three prosecution witnesses, namely S.R. Harrison, J.J. Julius and M. Fourie coupled with her subsequent admissions. On the same day, 3 July 2013, she was sentenced to 18 years imprisonment.

[5] Aggrieved by the sentence imposed on her, the appellant applied for leave to appeal. On 27 August 2013 the regional magistrate refused her application. She then approached the judge president by way of a petition. On 26 February 2014 Kruger J *et* C. Reinders AJ on petition granted her leave to appeal.

[6] The grounds of the appellant's appeal were:

> "**AD VONNIS**
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> Die geleerde Streeklanddros het op die volgende aspekte fouteer:
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> 1. Deurdat die vonnis in al die omstandighede van die saak skokkend onvanpas is;
> 2. Deurdat die erns van die misdaad en die gemeenskapsbelang oorbeklemtoon is;
> 3. Deurdat die persoonlike faktore rakende die applicant onderbeklemtoon is;
> 4. Deurdat applikant deur Jackson mislei en gebruik is onderbeklemtoon is;
> 5. Dat applikant bykans 1 jaar in aanhouding verhoorafwagtend was onderbeklemtoon is;
> 6. Deurdat die relevante faktore globaal geneem onderbeklemtoon is."

A notice of appeal was filed with the clerk of the court on 8 July 2013.

[7] The question in the appeal was whether the trial court imposed on the appellant a sentence which in all the circumstances was shockingly severe and therefore inappropriate. We are therefore called upon to determine whether the trial court improperly or unreasonably exercised its judicial discretion in sentencing the appellant.

[8] On behalf of the appellant Mr Van Rensburg submitted that the answer to that crucial question had to be in the affirmative. Therefore counsel urged us to uphold the appeal and to interfere with the sentence.

[9] However Mr Lencoe differed. On behalf of the respondent counsel submitted that the answer to that question had to be in the negative. Accordingly, counsel urged us to dismiss the appeal and to confirm the sentence.

[10] In considering the appeal we have to take into account the appellant's personal circumstances. The first component of the triad concerns favourable factors to the appellant as an individual offender.

- The appellant was 46 years of age at the time she committed the offence.
- She was 47 years at the time she was sentenced.
- The level of formal school education she received, appears nowhere on the record.
- She was a mother of three children of whom one was still a dependent minor.
- She was a married woman although she and her husband were estranged.
- She lived in Johannesburg, boarded a bus at Vanderbijlpark and headed to Cape Town.
- She was arrested at Kroonstad on 1 August 2012.
- She was incarcerated for almost 12 months.
- She had no previous convictions relating to drugs, but had unrelated convictions.
- She was engaged by a certain Mr Jackson as her courier.

- Her drug cargo consisted of “crystal meth”, commonly called “tik” and categorised as an undesirable dependence producing substance.
- During the course of the presentation of the prosecution case she made admissions in terms of section 220.
- Her reward for rendering courier services to the aforesaid Jackson was R1000,00.

Those then were the personal circumstances of the appellant.

[11] In considering the appeal we also have to take into account the nature and seriousness of the crime the appellant has committed. The second component of the triad concerns the gravity of the crime which gave rise to the appellant’s conviction. The most prevalent and serious crimes in the country were legislatively identified, scheduled and singled out for severe punishment 16 years ago. Included in such variety of social menaces, is the crime called drug trafficking. About this crime the regional magistrate had this to say:

> “Die misdaad waarvan u skuldigbevind is, is van ‘n baie ernstige aard.”

[12] The quantity of the drug found in the appellant’s possession, was almost 26,0 kg. A quantity of drugs found in an accused person’s possession, must invariably be considered as a barometer for the moral blameworthiness of an individual concerned. It follows that therefore, the larger the quantity of drugs an offender deals with or possesses the heavier the

sentence would be. This is of cardinal importance. Unless such a logical norm is consistently observed and applied, there can be no satisfactory uniformity in the sentences passed by the courts. It would be absurd to have a person convicted of a huge quantity of drugs sentenced the same way as someone who has been convicted of a far less quantity – **S v Nkombeni** 1990 (2) SACR 465 (TK).

[13] In **S v Keyser** 2012 (2) SACR 437 (SCA) at 444e [30] the court commented as follows:

> "To my mind the most significant distinguishing feature is the quantity of the drugs carried in (sic) by the appellant."

[14] Our courts have previously imposed heavy sentences for possession of prohibited drugs of far less weight compared to the weight of the drug the appellant was trafficking in, for instance in **S v Keyser**, *supra*, the sentence of 20 years imprisonment imposed on a courier who was found in possession of 6,5 kg of cocaine with a street value of approximately R2 million, was confirmed on appeal. In **S v Jimenez**, 2003 (1) SACR 507 (SCA), a sentence of 12 years imprisonment imposed on an offender who was found in possession of 653,4 g of cocaine, was confirmed on appeal. Although the courts were dealing with a dangerous substance, cocaine, in both cases, the weight involved in the present appeal was almost four times the weight involved in the **Keysers's** appeal. The quantity of drug involved in the

Jimenez appeal was like the proverbial drop in the ocean as compared to the quantity we are grappling with *in casu*.

[15] The appellant resided in Johannesburg, but travelled a considerable distance to Vanderbijlpark to catch a bus. She was driven to that town by a certain Jackson, her principal. Before boarding the bus destined to Cape Town, she and Jackson deceptively behaved as if they were innocent lovers saying their sweet goodbyes to each other. In truth and in reality they were a supplier and a courier of a harmful drug. They engaged in a dubious and amorous embrace in a fruitless attempt to draw the attention of the onlookers away from the heavy and incriminating bags.

> "Wanneer die Hof kyk na die totaliteit van die aanvaarde getuienis, is dit voorts duidelik aan hierdie Hof dat die optrede deeglik beplande optrede aan u kant en die persoon wat saam met u was."

[16] In my view the court *a quo* correctly found that this offence was planned. That much is very clear from the conduct of the appellant at the time she boarded the bus and also at the time of her arrest. The contention that the conduct of the appellant was an indication that she was an amateur in the drug trafficking business cannot be supported by the evidence. The appellant was arrested at Kroonstad later on the same day, 1 August 2012. Shortly before her arrest she frantically destroyed the written luggage label on her drug bags. She swiftly walked away from the bags. She quickly disembarked

and quickly re-boarded the bus. She expressly denied that she was the carrier of the drug bags.

[17] Although Jackson and not the appellant had actually loaded the drug bags into the bus at Vanderbijlpark, the appellant's conduct immediately prior to her arrest, showed that she was a willing co-perpetrator. She was not just a naïve woman who was taken advantage of by a drug lord. She was not an amateur in drug trafficking. She was a cunning mule. The contention that she was totally under the influence of Jackson was not borne out by the facts. It cannot be argued that she was out of her depth and clearly under the influence of her principal. The court *a quo* correctly found that the offence was deceptively planned. She was deeply involved in that planning. It was improbable that Jackson would have entrusted such a huge quantity of drugs to someone who was not a tried and tested courier.

[18] In the circumstances I am persuaded by Mr Lencoe's contention that it was more probable than not that the appellant and Jackson had previously conducted some trial runs with success, involving small quantities of drugs. Perhaps such previous dealings probably precipitated the current one and established some trust which gave rise to the large consignment involved in this case. The substantial value of approximately R7 600 045,00 in a way supported the contention that the two probably had previous dealings in connection with drug trafficking. Their relationship seemed to have been based on that mutual, criminal enterprise, rather

than mutual dependence on honourable business dealings between a vendor and a customer. Moreover no soft goods were found in her possession. Unlawful dealing and not lawful vendering was apparently the sole purpose of her mission to Cape Town. I am not persuaded that the large quantity and the substantially value thereof were unduly emphasised by the court *a quo*.

[19] There are two types of dependence producing substances. Some are undesirable substances, such as “crystal meth”. Others are dangerous substances such as cocaine. Mr van Rensburg, counsel for the appellant, argued that the court *a quo* failed to appreciate the significance of the distinction between the two types of dependence producing substances. The contention was untenable in my view. The court *a quo* was mindful of such distinction. The regional magistrate correctly pointed out that the prescribed maximum sentence, according to the Statute, was 25 years imprisonment irrespective of whether the conviction concerned an undesirable or dangerous substance.

[20] I can, however, be seen that the lawmaker views both types in a serious light. It is quite understandable that where two couriers are found in possession of the same quantity of drugs, the courts will not have the same punishment imposed on them if the one was dealing in a dangerous substance and the other in an undesirable substance. Where, however, a substantial quantity of an undesirable substance is found in a courier’s possession and a trivial quantity of the dangerous

substance is found in another courier's possession, the courts are inclined to punish the possessor of an undesirable substance more severely than the possessor of a dangerous substance. That is precisely the situation we are here dealing with on this appeal.

[21] Mr Lencoe submitted that in itself the sentence of 18 years imprisonment imposed on the appellant was indicative of the regional magistrate's appreciation that the appellant had been convicted of dealing in the prohibited undesirable substance and not the prohibited dangerous substance. Counsel argued further that the regional magistrate would probably have imposed a heavier sentence on the appellant had the appellant been convicted of dealing in a prohibited dangerous substance given the large quantity of the drug she was trafficking. There is much to be said for Mr Lencoe's submission but less for Mr Van Rensburg's.

[22] Sight must not be lost of the reality that it is well documented that there is a proven connective tissue between the sustained illicit use of prohibited drugs and the increase in crime rates. The illicit use of the drug "crystal meth" has been heavily implicated in the research on crime in the mother city. See an article **The Rise of 'Tik' and Other Crime**, 2005 SACJ 306 especially 320 per Julie Berg.

[23] In sentencing the appellant therefore, the following set of aggravating factors were taken into account by the court *a quo*:

- That the crime of drug trafficking was rife in the region of its jurisdiction and the province as a whole.
- That the appellant was involved in its planning.
- That she was not a naïve and vulnerable courier who financially and totally dependent on a drug supplier for her leaving.
- That she was not a small fry totally influenced by a big shark to commit the crime.
- That the drug “crystal meth” was easy to make and readily available and easy to distribute with the aid of greedy couriers like the appellant.
- That a substantially huge quantity of the prohibited drug was found in the appellant’s possession.
- That the street value thereof, estimated to be approximately R7,6 million at least, was exceptionally huge.
- That the intended destination of the drug was Cape Town, a city already riddled by the illicit use of the same drug found in the appellant’s possession.
- That the importation of “tik” into the city would, therefore, have worsened a situation which was already adversely affected by prohibited drugs.

So much about the magnitude of the crime committed by the appellant.

[24] In considering the appeal we also have to take into account the interests of society offended by the appellant. The third

component of the triad, like the second component, concerns the aggravating factors.

[25] It has been established through research that methamphetamine or "tik" as it is commonly known, is highly addictive with dire consequences on the addict. Some of its adverse effects are that it produces violent and psychotic behaviour, epileptic seizures, uncontrollable rage and ailments such as Parkinson disease as well as memory loss. These are some of the findings of Julie Berg in the article **The Rise of 'Tik' and Other Crime**, 2005 SACJ 306. In brief, these then are some of the health hazards of the prohibited substance.

[26] The lives of drug addicts are often destroyed by their addiction. The effects thereof not only are restricted to the addict, but are also felt by the family and the society at large. In **S v Homareda** 1999 (2) SACR 319 (W) at p 326 the court remarked:

> "The type of offence of which the appellant stands convicted has the potential to ruin the lives of families in South Africa."

[27] In **S v Jimenez** 2003 (1) SACR 507 (SCA) at p 520 par [25] Olivier JA remarked:

> "To the list of evils enumerated above must be added the devastating effect the addiction to hard drugs has on the family, relations, employees and friends of the user. Families fall apart, are bankrupted and drained emotionally by the experience of

> seeing a family member, usually a youth, becoming addicted and changing from a healthy, lovely child to a human wreck."

[28] The negative and devastating repercussions of drugs on the society in general and the addicts in particular, are so notorious that no reasonable person can claim to be ignorant of them. The appellant cannot be heard to claim that she was ignorant of such devastating effects of the drugs she was carrying. In my view she must be held to have taken such inherent danger into the bargain when she agreed to traffic a consignment of a large quantity of drugs from Gauteng to the Western Cape. In **S v Keyser** 2012 (2) SACR 437 (SCA) at 444f par [30] the court remarked:

> "… more important was the number of lives potentially affected by the abuse of the drug. The appellant must have reconciled himself to sowing the seeds of destruction, directly and indirectly, in the lives of a substantial number of people, including children. That consideration alone far outweighed his personal circumstances and justified a very long incarceration."

[29] What is very troubling about "tik" is the ease with which it can be manufactured. The harmful recipe is readily available on the internet. Anyone with access to the internet can easily manufacture this drug. Consequently this drug has become so easily available that it has been referred to as the drug of choice. Since it is easy to make, easy to distribute and cheap to sell, children, that vulnerable and fragile class of our society, form a significant if not a major portion of its addicted abusers.

[30] The prohibited undesirable drug “tik” adversely affects a very wide range of society because the formula is simple, because it is readily available in the dark street corners and because it is cheap compared to prohibited dangerous substances such as cocaine. These in brief are some of the properties that make “tik” so harmful to society.

[31] The second category of aggravating factors may now be summed up and tabulated:

- The undesirable drug of which the appellant has been convicted is very harmful in that it has an adverse impact on a large section of society, particularly children.
- The young lives of drug addicts are often irredeemably destroyed by drug addiction.
- The addiction to an undesirable substance almost invariably progresses, with the passage of time, to addiction to dangerous substances.
- The devastating impact of drugs, be they hard or soft, on addicts, extends beyond the families to society at large.
- The appellant was aware or ought to have been reasonably aware of the devastating repercussions of drugs on society, particularly its children whose lives she potentially exposed to the addictive use of the undesirable drug.
- She, for selfish commercial purposes, was prepared to harm the community.

- The moral blameworthiness of appellant's actions lies in her willingness to destroy others in order to profit from their harmful addiction and eventual demise.

This then completes the third component of the triad.

[32] It appeared to me that the aggravating factors in this appeal overshadowed the mitigating factors by a very huge margin. The appellant was not a first offender in the strict sense of the word. Although not relevant to drug trafficking she has some previous convictions. Perhaps the strong aggravating factor was the exceptionally huge quantity of the undesirable drug the appellant was transporting.

[33] Since the respondent did not invoke the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 as amended, the question of the prescribed minimum sentence did not arise. I was not persuaded by the contention that the appellant was seriously and unfairly prejudiced by such an omission. Nothing materially significant turned on that point.

[34] First and foremost it was significant to bear in mind that the appellant was a woman. She was 46 years of age at the time she broke the law through drug trafficking. She was a mother of one dependent minor child, a girl. She was a first drug offender. She deserved a credit of two years for her pre-sentence incarceration. The critique levelled against the court *a quo* was that it attached inadequate value to her personal

profile as an individual woman offender living in a state of matrimonial separation.

[35] The quantity of the drug involved in the case was indeed huge. All the same the difficulty we had was that we were referred to no previously decided caselaw on sentence concerning the undesirable substance methamphetamine. Huge as it was, exceedingly larger consignments of drugs such as cannabis transported by cargo carriers are imaginable. Very severe sentences such as the one imposed on the appellant should, in my view, generally and sparingly be reserved for drug manufacturers, suppliers and repeat offenders. In this instance we are not grappling with a worst case scenario of a courier.

[36] Although the appellant did not express remorse, her belated admission of guilt was not devoid of any significance. By doing so, she effectively acknowledged that the case against her was formidable and that it would serve no further practically useful purpose to delay the inevitable verdict. Sometimes accused person unnecessarily and regrettably prolong criminal trials notwithstanding the formidable strength of the prosecution case and the hopelessness of their defence.

[37] The two scenarios are different. The former unlike the latter saves public time and scarce public resources. The practical curtailment, *per se*, of the costly proceedings is, in my view, a worthwhile gesture for which an offender needs to be rewarded. I cannot see anything wrong in having such a

gesture factorised in favour of an offender. I hasten to add that we should guard against the tendency of conflating the issue with that of remorse. Even the most remorseless of offenders can curtail proceedings and thereby save valuable public time and public resources.

[38] Having considered all the relevant factors and notwithstanding a good judgment by the court *a quo*, I feel unease about the severity of the sentence imposed on the appellant. In my view the sentence of 18 years imprisonment was, in all the circumstances, disturbingly severe. The court *a quo* somehow excessively stressed the gravity of the crime together with the harm to society interest at the expense of the profile of the appellant. As a result of the imbalance the court *a quo* inappropriately imposed a sentence which tended to be more retributive than deterrent in effect.

[39] I am persuaded by Mr Van Rensburg's submission that a material and appealable misdirection has been committed to the appellant's detriment. That being the conclusion, appellate interference is justified. I am, therefore, inclined to uphold the appeal on the grounds as set out in paragraph 6 with the exception of sub-paragraph (4) thereof. The submission that the court *a quo* improperly exercised its sentencing discretion was not without substance.

[40] Accordingly I make the following order:

40.1 The appeal succeeds.

40.2 The conviction stands.

40.3 The sentence of 18 years imprisonment imposed on the appellant is set aside and it is substituted with the one below.

40.4 The appellant is sentenced to 18 (eighteen) years imprisonment of which 4 (four) years are suspended for five years on condition that the appellant is not again found guilty of contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 committed during the period of suspension.

40.5 The sentence is antedated to 3 July 2013.

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M.H. RAMPAI, AJP

I concur.

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N. M. MBHELE, AJ

On behalf of appellant: Adv T.B. van Rensburg
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv M. Lencoe
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

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