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

REVIEW 18531
REVIEW 18532

In the matter between

THE STATE

V

TOM CARSLIN FREDERICK

And

THE STATE

V

ANATHI MAXHONGO

CORAM: DOLAMO J; THULARE AJ

JUDGMENT ON REVIEW 11 JULY 2018

THULARE AJ

[1] The two matters came before me on review independently at the same time and raised the same issue from the same magistrate. In the light of the nature and approach to the issue, I did not deem it meet to refer the matter back to the magistrate for her statement.

[2] The accused in both matters were charged with unlawful possession of a minimal amount of an undesirable dependence-producing substance listed in Part 3 of schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 in contravention of section 4(b) of the said Act read together with other sections of that Act. In respect of the first matter, it was an unknown amount of methampethamine contained in a lolly of the drug commonly known as tik. In respect of the second matter, it was 1.4 grams of crushed methaqualone, a drug commonly known as mandrax, contained in a white paper folder. In both instances, it appears that it was the amount of drug already prepared for and in use.

[3] In both matters the accused pleaded guilty. They both had a number of previous convictions relating to the same offence. In the first matter, the accused had five such previous convictions. In the first and the last two previous convictions which were heard together and taken together for purposes of sentencing, he was cautioned and discharged. In the second one he was fined R500 or 50 days imprisonment and in the third he was fined R3000 or 60 days imprisonment. He also had an unrelated previous conviction of theft for which he was sentenced to 6 months imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

[4] In the second matter, the accused had 11 previous convictions for the same offence. In the first of these, he was sentenced to four months imprisonment wholly suspended on condition that he is not convicted of the same offence committed during the period of suspension. The second conviction was six months imprisonment wholly suspended on unknown conditions. The third conviction he was fined R500 or 50 days imprisonment. The fourth conviction he was fined R600 or 30 days imprisonment wholly suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension. The fifth conviction he was fined R500 or 30 days imprisonment wholly suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension. The sixth conviction he was sentenced similar to the fifth. The seventh conviction he was fined R1000 or 60 days imprisonment wholly suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension. The eighth conviction he was sentenced to R1000 or 30 days imprisonment of which R500 or 15 days imprisonment was suspended for 3 years on condition that he is not convicted of the same offence committed during the period of suspension. On the ninth conviction he was sentenced to R5000 or 3 months imprisonment wholly suspended for 4 years on condition that he is not convicted of the same offence committed during the period of suspension. On the 10th conviction he was fined R500 or 50 days imprisonment. On the 11th conviction he was sentenced in terms of section 276(10(B) of Act 51 of 1977 to 3 years imprisonment. The accused committed further offences of this nature whilst terms of imprisonment, in some instances more than one, were still hanging over his head as suspended sentences.

He also has three unrelated previous convictions, two for theft and one for assault common.

[5] The accused in matter 1 was sentenced to three years imprisonment suspended for five years on condition that the accused is not convicted of section 4(b) of the Drugs and Drug Trafficking Act 51 of 1977 committed during the period of suspension. The accused in matter 2 was sentenced to 36 months imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA). In respect of matter 1, the law referred to in the sentence is simply confusing, and makes the sentence incapable of being made an order of a court, and called for intervention.

[6] In respect of both matters two further issues called for attention. The first is the issue of proportionality of a sentence to the offence, and the second issue, which also bears relation to the first, is the approach to sentencing in offences where, unless there is direct evidence to the contrary, the direct consequences of the offence is for all intents and purposes mostly suffered by the person of the perpetrator of the offence, whilst others may suffer indirectly and often secondary.

[7] In the unreported judgment of *S v Heuwel (171092) [2017] ZAWCHC 155 (2017] ZAWCHC (20 December 2017)* I gave attention to the proportionality of sentence to the offence, which views are worth repeating here, and from para 13 to 15 said:

"[13] Proportionality between the offence and punishment is part of our law on sentencing. The previous convictions of an accused have a place in sentencing an offender, as required by section 271(4) of the CPA. They should, however, not be permitted to overwhelm the triad in Zinn, which remain factors which are relevant to just sentencing. The fact that one is dealing with a repeat

offender with previous convictions is not sufficient reason to ignore the duty to balance the relevant factors and the purpose of punishment. The sense of proportion should not be lost and sentences be imposed which, by comparison, are too harsh – S v Smith 2003 (2) SACR 135 (SCA) at para 5.

[14] The number of times that the offence is being committed does not make it less petty. It remains petty no matter how often it is committed – S v Stenge 2008 (2) SACR 27 (C) at para 22. In my view, the number of times that an accused commits a particular offence does not make him or her less human, such that he or she is to be discriminated unfairly against and not enjoy the equal benefit of the law, in particular the legal principles on sentencing. Furthermore, it cannot be that once the previous convictions are admitted or proven, the convictions of old are resurrected and the previous sentences are extinguished, leaving the accused open to be sentenced again when he has already paid his dues.

[15] The moral culpability must bear relation to the crime he was currently convicted of. The length of the period of imprisonment imposed on the accused bears no relation to the gravity of the offence for which he has been convicted of. His personal circumstances are neutral – Montsho v S (20572/2014) [2015] ZASCA 187 (27 November 2015) at para 18. The accused was simply being used as a commodity to send a message to other would-be offenders. This denied him of his inherent and infinite worth. The length of the sentence which has been imposed on the accused is so disproportionate that in my view, it denied him his humanity."

[8] Generally, drugs are abused by the emotionally afflicted. Substance abuse is a manifestation of an emotional response to uncertain future developments which induce fear. Drug abuse is often a symptom of a flight from reality, or a retreat into the self so that one does not deal with the fear of powerlessness because of the behavior of others towards one's self worth, or what one perceives as an unfair distribution of power and ability. Abuse of drugs is often a comfort zone for those

who are at the imaginary train station of life waiting for their turn to board on the railway line to a better life and prosperity.

[9] Primarily, it is a crime against one's own self. It is a lifestyle. It is what one selects as his or her way of life as opposed to selection of what one necessarily requires to live. It is more of a social wrong than it is a serious crime. It takes courage, guts and determination to wake up beneath dirty cupboard boxes and sacks under a bridge, to move and progress in life to drive one's own car over that bridge. It takes misdirected fun and recreation, hopelessness, uncertainty and fear to smoke your life, including your car, towards destruction and a under bridge amidst the dirty boxes and sacks. It is the question of character, and inner and mental strength and a winning attitude. It is a choice.

[10] Both accused in the two matters before me present one clear message, to wit, long term imprisonment or the fear thereof, is not an answer to crimes primarily against one's self in general, and in particular, substance abuse as a lifestyle choice. Prisons are not like some sausage-producing machines where you put a stump of meat on the one end through a grind and you find ground tube-squeezed meat on the other end. In each and every case in repeated substance abuse matters, in my view, attempts should be made, in crafting an appropriate sentence, to try and establish where the accused dropped the ball of his or her vision for their life, and what contributed to that ball being dropped. Courts should strive in their sentencing, as the faith leaders would say, "to win back the soul" from outside prison. The "hit back" approach of the majority of our magistrates' courts is clearly not working.

[11] In dealing with substance abuse, magistrates' courts should bear in mind that there is a comprehensive national response for the combating of substance abuse and this national response provides for mechanisms aimed at the demand and harm reduction in relation to substance abuse through prevention, early intervention, treatment and re-integration programmes [Preamble to the Prevention and Treatment for Substance Abuse Act 70 of 2008] (PATSAA).

[11] In my view, where a case against the accused *prima facie* is that he is a person suspected of sustained or sporadic excessive use of substances, the National Prosecuting Authority (NPA) should call for a probation officer to investigate the circumstances of an accused and the provision of a pre-trial report recommending the desirability or otherwise of a prosecution [section 4(1)(j) of the Probation Services Act 116 of 1991] (the PSA). Where there has been a failure by the NPA to cause for a pre-trial report and the failure to consider the desirability of a prosecution for a *prima facie* patient of addiction to which treatment is probably due, the court convicting him or her should consider enquiring into whether such an accused is a person as defined in section 33 of PATSAA, and if so, the accused should find equal treatment and benefit of that law.

[11] If the accused is found not to be a person as defined in section 33 of PATSAA, then it is preferable that a probation officer's report should be obtained and that, depending on the diagnosis, the accused be placed in appropriate programmes in terms of the PSA, to help him or her back to productive and healthy lifestyles. This should include programmes or services aimed at diversion options from the formal

court procedure with or without conditions [section 1 read with section 3(l) of the PSA]. In my view, the time has arrived that in cases where an accused demonstrated, through previous convictions in custody of the State, that he suffers from sustained or sporadic excessive use of substances, in his or her address before evidence is adduced in terms of section 150 of the Criminal Procedure Act, the State Prosecutor should address the court and place on record sufficient reasons as to why that accused cannot be a beneficiary of early intervention services, which includes diversion programmes and other programmes aimed at preventing the need for such a person to be dealt with in terms of the formal criminal court procedure, and thereby derive equal protection and benefit of the PSA.

[12] The trial court did not consider its duties in line with the comprehensive national response for the combating of substance abuse and the alternatives to sentencing, with its advantages. The failure of the trial court in both matters to consider other options appropriate for the accused, requires of this Court to intervene. The sentences imposed are so disproportionate that they call for intervention. The amounts of substances both the accused admitted to having possessed is very minimal to warrant a stringent response in the vein of a sentence of imprisonment. However, the lives of the accused matter.

[13] In the result, I would make the following order:

(a) The sentences imposed by the trial court on the accused in both matters respectively, are set aside.

(b) Each of these matters is referred back to the trial court for the court to consider holding an enquiry in terms of section 37 of PATSAA with a view to act in terms of section 36(1) in lieu of sentence or order that the accused be placed under probation services in terms of the PSA.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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DOLAMO, MJ

JUDGE OF THE HIGH COURT