Case No 40693
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SHARON DAWN HERMANUS

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HEFER, VIVIER et HARMS JJA. HEARD: 16 September 1994. JUDGMENT DELIVERED: 16 September 1994

REASONS AND ORDER

VIVIER JA/

VIVIER JA:

The appellant, on her plea of guilty, was convicted in the Magistrate's Court on a charge of dealing in dangerous dependence-producing drugs in contravention of sec 2(c) of Act 41 of 1971. She was sentenced to four years' imprisonment of which two years' imprisonment was conditionally suspended for five years. Her appeal to the Witwatersrand Local Division against sentence failed. Subsequently leave was granted upon petition to appeal to this Court against the sentence.

After hearing argument this Court allowed the appeal, stating that reasons and the order would be furnished later. The reasons and order follow.

At the trial the appellant admitted to having sold 20 tablets containing phendimetrazine, a dangerous dependence-producing substance, commonly known as obex. She had obtained the obex

tablets lawfully on a medical doctor's prescription for her own use in order to lose weight and had previously given some obex tablets to a friend of hers. The friend was arrested and informed the police that she had obtained the tablets from the appellant. A trap was set up and on 14 March 1990, and in Eloff Street, Johannesburg, the appellant sold the 20 tablets to a policeman acting as a trap at a price of R7 per tablet after he had informed her that her friend had sent him to her. Although the appellant had been charged with possessing six more tablets with the intention of selling them this was not proved.

The appellant is a 33 year old woman and the mother of two children aged twelve and seven years who are dependent on her. She is not married. She works as a secretary and earns R2 200 per month. The magistrate treated her as a first offender, disregarding a previous conviction incurred on 28 September 1977

for the possession of dagga for which she was given a suspended sentence.

Early on in his judgment on sentence the magistrate said that he accepted that the appellant did not supply drugs to others on a regular or organised basis and that she could not be regarded as a drug dealer in the true sense of the word. From an analysis of the rest of his judgment on sentence it seems that the magistrate lost sight of this finding when he concluded that an exemplary sentence was called for in the present case. In coming to this conclusion the magistrate repeatedly emphasised the seriousness of the offence of dealing in drugs and in this regard he quoted certain passages from S v Howe 1989 (2) SA 473 (W) at 478E-G and S v Gibson 1974 (4) SA 478 (A) at 481H. These passages, however, deal with drug dealers proper and are not strictly relevant to the facts of the present case. So, for example, in the passage from S v Gibson,

Holmes JA states that "a supplier for gain may in general be regarded as a vicious person who needs to be put down". Not only was the present appellant not a regular supplier but there was no evidence that she sold the tablets for more than she paid for them. In his additional reasons the magistrate said that the appellant's motive for selling the tablets could only have been greed. In making this finding the magistrate misdirected himself.

The magistrate further referred to the high prevalance of the offence in the Johannesburg area and said that this in itself was sufficient reason for him to increase the seventy of the sentence. He stressed the need for a strongly deterrent sentence in the interests of the community and said that a light sentence would not bring about that result. In S v Maseko 1982 (1) SA 99 (A) at 102E-G Miller JA said the following about exemplary sentences:

> "What has to be guarded against when exemplary sentences are imposed is the danger that excessive devotion by a

> judicial officer to furtherance of the cause of deterrence may so obscure other relevant considerations as to result in very severe punishment of a particular offender which is grossly disproportionate to his deserts."

In my view this is what has happened in the present case. Dealing in dependence-producing drugs is undoubtedly a very serious offence. There are, however, exceptional circumstances in the present case which distinguish it from other cases of its kind. The appellant lawfully possessed the tablets. The sale to the police trap could certainly be regarded as an isolated occasion, despite the fact that the appellant had previously given some tablets to her friend. Nothing is known about that incident and too much should not be made of it. It has not be shown that the appellant sold the tablets to the police trap in order to make a profit. In my view the magistrate overemphasised the seriousness of the crime and the need for deterrence and attached insufficient weight to the particular

circumstances of the case, with the result that the appellant received an unduly severe sentence. Cf S v Collins 1990 (1) SACR 577 (A) at 581b-f.

The Court a quo took into account, in aggravation of sentence, that on the day the appellant sold the 20 tablets to the police trap she possessed a further six obex tablets with the intention of selling it. As I have said, there was no evidence to justify such a finding, and the Court a quo misdirected itself in this regard.

For these reasons the appeal was allowed. The following order is made. The sentence imposed by the magistrate is set aside and the following sentence is substituted. A fine of Rl 000 or in default of payment thereof six months' imprisonment; and two years' imprisonment suspended for five years on condition that the accused is not convicted of contravening sections 2(a), 2(b), 2(c)

or 2(d) of Act 41 of 1971 during the period of suspension in respect of which she is sentenced to unsuspended imprisonment of not less than six months' imprisonment.

W VIVIER JA.

HEFER JA)
HARMS JA) Concur.