SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20091/2014

In the matter between:

JOHANNES WINDVOGEL **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Johannes Windvogel v The State* (20091/2014) [2015] ZASCA 63 (8 May 2015).

Coram: Mhlantla and Leach JJA and Mayat AJA

Heard: **30 March 2015**

Delivered: **8 May 2015**

Summary: Criminal law and procedure – application in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 for special leave to appeal against a decision of a division of the high court sitting as a court of appeal – high court has no jurisdiction to hear application – special leave

of the Supreme Court of Appeal is required – special leave to appeal against sentence granted.

Drug Offences – cocaine – dealing in contravention of s 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 – sentence – appellant sold cocaine during a police trap – high court misdirected itself when ante-dating the sentence to a date when appellant was on bail – cumulative effect of sentence disturbingly inappropriate – sentence set aside and replaced by sentence of eight years on each count – a portion of the sentences in the three counts to run concurrently with sentence on first count – effective sentence of 20 years' imprisonment.

ORDER

On appeal from: Gauteng Division, Johannesburg (Wepener J with Vally J concurring sitting as court of appeal):

1 The appellant is granted special leave to appeal in terms of s 16 (1)(*b*) of the Superior Courts Act 10 of 2013 against the sentence of imprisonment imposed by the Gauteng Division, Johannesburg.
2 The appeal is upheld.
3 The sentence imposed by the court a quo is set aside and replaced with:
'(a) The accused is sentenced to a period of eight years' imprisonment on each of the four counts, that is, counts 6,7,8 and 10 respectively.
(b) A period of four years of each sentence imposed on counts 7, 8 and 10 is ordered to run concurrently with the sentence imposed on count 6 (effectively a sentence of 20 years' imprisonment).
(c) In terms of s 282 of the Criminal Procedure Act 51 of 1977 the

sentence is antedated to 31 January 2003.'

JUDGMENT

Mhlantla JA (Leach JJA and Mayat AJA concurring)

[1] The appellant was arrested on 28 June 2000 in consequence of a trapping operation by members of the South African Police Service. He was charged together with his former co-accused in the regional court, Johannesburg on 12 counts of dealing in prohibited substances in contravention of s 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act).[1] At the commencement of the trial, the appellant pleaded not guilty. The State adduced evidence whilst the appellant elected not to testify. The uncontested evidence tendered on behalf of the State was that the appellant had been identified as a dealer. The police officers who set up a trap for the appellant testified that the appellant had participated during the sale of cocaine over a period of two weeks on four different occasions and that he appeared to be in control of the operations.

[2] At the end of the trial, the appellant was convicted on four counts as follows:

(a) Count 6: 3.1 grams of cocaine and one tablet containing methaqualone (a mandrax tablet) sold for R1 300;

(b) Count 7: 3.8 grams of cocaine sold for R1 450;

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[1]Section 5 (*b*) of the Drugs Act reads:
'Dealing in drugs
No person shall deal in -
(a)….
(b) Any dangerous dependence-producing substance or any undesirable dependence-producing substance.'

(c) Count 8: 9.5 grams of cocaine sold for R2 800; and

(d) Count 10: 4.8 grams of cocaine sold for R 1 300.

[3] On 31 January 2003 the trial court imposed a sentence of eight years' imprisonment on each count. An effective term of 32 years' imprisonment was thus imposed. The trial court ordered this sentence to run concurrently with a sentence of 20 years' imprisonment that the appellant was already serving for a previous conviction for a similar offence. Two months later, the trial court granted a confiscation order against the appellant's estate in terms of s 18 of the Prevention of Organised Crime Act 121 of 1998.

[4] On 18 February 2004 the appellant's previous conviction and sentence of 20 years' imprisonment were set aside on appeal. Subsequently, the trial court granted the appellant leave to appeal against the sentence imposed in this matter. On 6 July 2005 the appellant was released on bail pending appeal. At that stage, he had already served a period of almost two and a half years of his sentence.

[5] On 7 November 2013, almost nine years after leave to appeal had been granted by the trial court, the appeal came before the Gauteng Division, Johannesburg (Wepener and Vally JJ). Throughout this period the appellant had been on bail pending appeal. The court a quo had regard to the appellant's previous convictions most of which related to dealing in drugs and held that the appellant was an unrepentant drug dealer. It concluded that the total sentence of 32 years' imprisonment had been appropriate.

[6] In an attempt to afford the appellant the benefit of the period already served, the court a quo said:[2]

'The appellant was incarcerated from 2002 to July 2005, i.e. a period of 3 years on the conviction and sentence of 20 years' imprisonment, which have been set aside. This, the magistrate could not take into account as the conviction had not been set aside when the appellant was convicted and sentenced by the magistrate in the current matter. This would, in my view, be an appropriate case to take the period of imprisonment so served into account by antedating the sentence by 3 years. The appellant should have the benefit of 3 years' incarceration as if it was served for the conviction in this matter.'

[7] The court a quo therefore set aside the sentence imposed by the trial court and replaced it with an identical sentence but antedated it to 7 November 2010. On 12 November 2013 the appellant applied for leave to appeal to this court. Two weeks later, on 29 November 2013 the court a quo granted leave to appeal to this court.

[8] The appeal in this court was heard on 1 March 2015. Subsequent to the hearing of the appeal, it became apparent that the court a quo did not have jurisdiction to hear an application for leave to appeal to this court as s 16(1)(*b*) of the Superior Courts Act 10 of 2013 (the Act), which came into operation on 23 August 2013, provided that an appeal against any decision of a division on appeal to it lies to the Supreme Court of Appeal upon special leave having been granted by this court. Consequently, the jurisdictional basis for an appeal to this court was absent. In the result, the court a quo did not have the power to grant the appellant leave to appeal to this court and the proceedings on 1 March were a nullity.

[2] Paragraph 21.

[9] This court had to consider an application for special leave to appeal before entertaining the appeal. The parties were apprised of the applicable provisions and the appellant was requested to lodge a formal application for special leave to appeal to this court.[3] On 27 March 2015 the appellant then filed an application for special leave to appeal to this court in respect of sentence in terms of s 16(1) of the Act. The application was heard on 30 March, being the reconvened date of the matter.

[10] In *Van Wyk* v *S, Galela* v *S*,[4] this court when considering an application for special leave said:

'An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.'

[11] This court has held that the imposition of a sentence is pre-eminently within the discretion of a trial court. A court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is: disturbingly inappropriate or so totally out of proportion to the magnitude of the offence; sufficiently disparate; vitiated by misdirections showing that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have

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[3]Section 17(3) of the Act provides:
'(3) An application for special leave to appeal under section 16(1)(*b*) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)(*c*) to (*f*) shall apply with the changes required by the context.'

[4]*Van Wyk* v *S, Galela* v *S (*20273/2014, 20448/2014) [2014] ZASCA 152 (29 September 2014) para 21; [2014] 4 All SA 708 (SCA). See also *Westinghouse Brake* & *Equipment (Pty) Ltd* v *Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H – 565E.

imposed it.[5]

[12] The merits of an appeal are relevant when determining whether special circumstances exist in order to grant special leave to appeal. Before us, counsel for the appellant urged us to grant special leave to appeal on the basis of the following grounds: first, that the sentence imposed by the court a quo did not achieve its stated purpose of granting the appellant the benefit of the period incarcerated and that it resulted in him having to serve more than 32 years' imprisonment; secondly, the cumulative effect of the sentence imposed is so severe as to be shockingly inappropriate. On the other hand, counsel for the State opposed the application on the basis that there were no reasonable prospects of success.

[13] I agree with the submission on behalf of the appellant. A sentence can only be antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977[6] (the CPA) when, on appeal or review a sentence for a conviction is either imposed or altered, and the court is satisfied that part of the sentence has already been served and that the offender should be given the benefit thereof. It is common cause that the appellant was not incarcerated during November 2010 nor was he serving a sentence when the appeal was heard. He was on bail from July 2005 until November 2013.

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[5] *S* v *Romer* 2011 (2) SACR 153 (SCA) para 22.

[6] Section 282 reads:

'Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.'

[14] Consequently, although the court a quo expressed its stated intent to afford the appellant the benefit of time he had already served after being convicted, the effect of it antedating the appellant's effective sentence of 32 years to 7 November 2010 had the opposite effect. It obliged the appellant to serve 32 years from that date, so the period of more than two and a half years from January 2003 to July 2005 which he served before he was released on bail did not accrue to his benefit. Effectively then, the appellant's sentence as imposed by the court a quo will be the two and a half years imprisonment that he served from January 2003 plus the 32 years he is obliged to serve with effect from 7 November 2010 ie a period of 34 and a half years. Such a sentence, of course, was not what the court a quo intended.

[15] In the result the court a quo misdirected itself and this resulted in a failure of justice which rendered the appeal unfair. This misdirection entitles us to intervene and consider sentence afresh. It follows that the appellant must be granted leave to appeal in terms of s 16(1)(*b*) of the Act to this court against his sentence.

[16] As to sentence: the appellant was 38 years old at the time of the commission of the offences and is the father of eight children. He was the sole breadwinner for his family. He has an unimpressive list of previous convictions. Three of these are relevant to the offences in this case. These are: on 19 November 1983 the appellant was convicted of dealing in drugs (6 mandrax tablets) and was sentenced to five years' imprisonment. On 11 March 1991 he was again convicted of dealing in drugs, being 61 mandrax tablets whereupon a sentence of 12 months' imprisonment was imposed. A further period of three years' imprisonment was suspended for

five years on certain conditions. On the same day the appellant was also convicted on two counts of dealing in drugs. A sentence of 12 years' imprisonment was imposed. The offences in this appeal were committed shortly after his release from prison. It is clear that the appellant continued with his drug dealing conduct over a period of many years. The sentences imposed as reflected in his SAP 69 form did not deter him from continuing with his drug dealing activities once he completed serving each sentence. In my view, the court a quo was justified in describing him as an unrepentant dealer.

[17] The appellant has been convicted of serious offences which were committed for personal gain. Counsel for the appellant categorised the offences as activities flowing from a single trapping operation which involved minimal values and quantities of drugs. He submitted that the police could have arrested the appellant during the first encounter but encouraged him to commit the other three offences. He submitted that under the circumstances, the sentence imposed was inappropriate. In support of this contention, he relied on the decisions of *S* v *Hightower*,[7] *S* v *Randall*[8] and *S* v *Mkhize*[9] to illustrate the severity of the sentence.

[18] This argument is without merit. The appellant conducted his drug dealing business on a continuous basis. The facts of the cases relied upon can be distinguished from the facts of this case. For example, in *Hightower*, the appellant, who was a 55 year old first offender, was convicted of dealing in 220 grams of cocaine. He had co-operated with the police. He had pleaded guilty and had shown remorse. His sentence of 20 years' imprisonment was set aside on appeal and replaced with one of

[7] *S* v *Hightower* 1992 (1) SACR 420 (W).
[8] *S* v *Randall* 1995 (1) SACR 559 (C).
[9] *S* v *Mkhize* 2000 (1) SACR 410 (W).

10 years, three years of which were suspended.

[19] In *Randall*, the accused was 23 years old and a first offender. She was convicted of dealing in 717 grams of cocaine. The court accepted that she had been involved in one incident and concluded that she had been induced to commit the offence by others who exploited her youth and innocence. The sentence of 15 years' imprisonment of which seven years were suspended was confirmed on appeal.

[20] In *Mkhize*, the appellant was 42 years old and a mother of two children. She was arrested in consequence of a police trap and co-operated with the police. She was convicted of dealing in drugs for selling 25 rocks of cocaine with a street value of R1 375. She had a previous conviction of dealing in drugs. The sentence of 12 years' imprisonment by the trial court was reduced to eight years' imprisonment of which three years were suspended on certain conditions.

[21] On the other hand, the appellant in this matter has three previous convictions and has been convicted on four counts of dealing in cocaine. It is clear from the evidence that he had conducted a drug dealing business over many years. The attempt to trivialise the serious nature of the offences is accordingly rejected.

[22] Having regard to all the relevant factors, I am of the view that the sentence of eight years' imprisonment on each count was appropriate. However, the cumulative effect thereof is shockingly excessive. Counsel for the State, in my view, quite correctly found himself unable to argue the contrary. It seems to me that a portion of some of the sentences should be served concurrently, so that an effective period of 20 years'

imprisonment be imposed. Furthermore, the period of approximately two and a half years already served by the appellant must be taken into account by the Department of Correctional Services. This can be achieved by an order antedating the sentence to 31 January 2003, being the date when the trial court imposed the sentence. The appeal therefore succeeds on these respects only.

[23] In the result the following order is made:

1 The appellant is granted special leave to appeal in terms of s 16 (1)(*b*) of the Superior Courts Act 10 of 2013 against the sentence of imprisonment imposed by the Gauteng Division, Johannesburg.

2 The appeal is upheld.

3 The sentence imposed by the court a quo is set aside and replaced with:

'(a) The accused is sentenced to a period of eight years' imprisonment on each of the four counts, that is, counts 6,7,8 and 10 respectively.

(b) A period of four years of each sentence imposed on counts 7, 8 and 10 is ordered to run concurrently with the sentence imposed on count 6 (effectively a sentence of 20 years' imprisonment).

(c) In terms of s 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to 31 January 2003.'

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NZ MHLANTLA

JUDGE OF APPEAL

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