THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 671/11

In the matter between: Reportable

SHERYL CWELE **First Appellant**

FRANK NABOLISA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Sheryl Cwele & another v The State* (671/11) [2012] ZASCA 155 (01 October 2012)

Coram: MPATI P, HEHER and PONNAN JJA and SOUTHWOOD and ERASMUS AJJA

Heard: 16 August 2012

Delivered: 01 October 2012

Summary: **Drug offences – cocaine – dealing in in contravention of s 5 *(b)* of Act 140 of 1992 – appeals against convictions dismissed – sentence – appellants engaging services of courier or 'mule' – sentence of 12 years' imprisonment increased to 20 years' imprisonment.**

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Koen J sitting as court of first instance):

1 The appellants' appeals against their convictions are dismissed.
2 The sentences imposed by the trial court are set aside and replaced with a sentence of 20 years' imprisonment in respect of each appellant.
3 In respect of the second appellant the sentence is antedated to 6 May 2011.

JUDGMENT

MPATI P (HEHER and PONNAN JJA and SOUTHWOOD and ERASMUS AJJA CONCURRING):

[1] The two appellants were charged in the Pietermaritzburg High Court, before Koen J, sitting with an assessor, with contravening section 5*(b)*, read with sections 1, 13(*f*), 17*(e)*, 18, 19, 64 and Part II of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 (the Act), viz dealing in dangerous dependence-producing drugs (count 1). In the alternative, they were charged with contravening s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956, read with s 5*(b)* and other relevant sections of the Act, viz conspiracy to deal in dangerous dependence-producing drugs. Two further charges (counts 2 and 3) were preferred against the appellants, but these were not persisted with by the State after it had closed its case, conceding that no evidence existed for a return of a verdict of guilty on the two counts. Accordingly, no further reference will be made to them.

[2] The appellants were convicted as charged on count 1 and were each sentenced to 12 years' imprisonment. With leave of the trial court the first appellant now appeals against her conviction, while the second appellant appeals against both his conviction and the sentence imposed on him. In their original heads of argument counsel for the State gave

notice that they would argue before this court that the trial court should have imposed terms of imprisonment of 15 years in respect of each appellant. However, they later filed supplementary heads, giving notice that they would argue, at the hearing of the appeal, that the sentences imposed on the two appellants be increased to 20 years' imprisonment.

[3] The evidence adduced by the State was largely uncontested. For convenience I shall refer to the first appellant, Ms Sheryl Cwele, as 'Sheryl' and to the second appellant, Mr Frank Nabolisa, a Nigerian national resident in this country, as 'Frank'. The evidence of the witness Ms Charmaine Moss (Charmaine) may be summarised as follows. During 2008 Sheryl, with whom she had become friends, approached her and mentioned that she (Sheryl) had worked overseas a number of times in 2005, but that she now held a permanent position with the Hibiscus Coast Municipality. Sheryl informed her that she had been contacted again to work overseas and that she had been directed by 'the Lord' in her dream to offer 'work' to her. When Charmaine showed interest in the offer Sheryl advised her that a firm in Sandton would secure the work for her and that she would be paid R25 000 for the two weeks that she would be overseas. Her airfare would also be covered.

[4] It appears that arrangements were duly made but, on a certain Monday morning during May 2008, when Charmaine was on her way to the airport to travel to Johannesburg, Sheryl telephoned her and told her not to depart that Monday as they were still waiting for her visa. Reference was made by Sheryl during the telephone discussions to her brother, Frank. In answer to an enquiry as to why her brother was involved Sheryl responded that he was one of the partners in the firm that organised the overseas work. Eventually, on Wednesday of that week Charmaine travelled to Johannesburg, where she met Frank, who showed her a computer printout of her air ticket, but told her that she could not depart on the Thursday because he did not want her to travel alone. He informed her that they were waiting for the arrival of another lady who already worked overseas and that the agency had incorrectly booked them on different flights. He promised, however, that she would definitely leave on the Saturday. On the Friday, at approximately 19h00, Frank collected her from friends with whom she had been staying in Johannesburg and took her to an area which she described as 'very scary', where he booked her into a place that he referred to as his friend's hotel. She became nervous and started to ask him questions such as where she was going to work; what kind of work she was going to do and who was

going to meet her at the airport in Turkey? He told her he would ask his sister to contact her. At some stage he slapped her face, accusing her of asking too many questions. That evening he took her out to dinner and later dropped her off at the hotel and undertook to take her to the airport the next day.

[5] Back at the hotel she tried to contact Sheryl by telephone. She was unsuccessful because Sheryl's mobile phone was switched off. She was able to contact Sheryl on Saturday morning and told her that Frank had said she should ask her (Sheryl) what she was going to do in Turkey. Sheryl advised her that there was nothing serious, that she should not speak to anyone and that she would be required to bring back a packet for Frank. But by then Charmaine had already lost interest in the overseas engagement – she had decided the previous evening that she would no longer go overseas. Since she knew of the availability of courier services to courier parcels from one country to another she became suspicious and decided that she would go back home. Frank picked her up from the hotel at approximately 10h00 on the Saturday morning and drove her to the airport, where he purchased a flight ticket for her to return to Durban, which she did. She had no further contact with Sheryl. Frank telephoned her once and enquired how she was. She told him that she was back at work.

[6] It is common cause that the charges that the two appellants faced before the trial court followed upon intensive investigations by South African authorities into the arrest and subsequent imprisonment, in Sao Paulo, Brazil, of another lady by the name of Ms Tessa Beetge (Tessa). Tessa was arrested at the Sao Paulo Airport on 13 June 2008 for drug trafficking, when two packets containing 9.25 kilograms and 1.025 kilograms of cocaine respectively were found in her luggage. A special agent in the Brazilian police, Jean Carlos de Bortole, testified that Tessa's air ticket reflected that she had come to Sao Paulo from Lima, Peru, and was in transit, on her way to Johannesburg. She received a sentence of seven years and nine months' imprisonment. It is not in dispute that the substance found in Tessa's luggage was cocaine, a dependence-producing drug, the unlawful sale or possession of which is punishable by law in South Africa.

[7] Tessa's mother, Ms Susanna Swanepoel (Ms Swanepoel), testified that at the time of her arrest in Brazil, Tessa, a divorcee with two minor daughters, had been living with her

and her husband at their home in Margate. During May 2008 she received information from Tessa that Sheryl had, via short message service (sms), offered her (Tessa) work overseas. Knowing that Tessa and Sheryl had been neighbours while the former was still married, Ms Swanepoel expressed a wish to speak to Sheryl before Tessa could go overseas. A meeting was then arranged at Sheryl's office in Uvongo, KwaZulu-Natal, which Ms Swanepoel attended, with her husband and Tessa, during the morning of 12 May 2008 and where Sheryl told them that Tessa would be going to London to do administrative work for two weeks; that all her flights and accommodation would be paid for; and that she would be collected daily from her hotel, which was one of the best hotels in London, and taken to work and back. Sheryl assured them (Tessa's parents) that they should not be concerned. Ms Swanepoel testified further that while they were still in Sheryl's office Sheryl instructed her personal assistant to telephone a person by the name of Frank, whom she presumed was from a travel agency, and to enquire whether the travel arrangements had been finalised. There was no reply and Sheryl said she would contact this Frank later. Thereafter Sheryl told them about her travels overseas and that the reason for her offering the opportunity to Tessa was because she was tired of travelling overseas. She told them that Tessa would be paid £1 000 for the work she was going to do. These assurances put Ms Swanepoel and her husband at ease and they were happy to allow Tessa to go on her first ever trip overseas.

[8] On 14 May 2008 Tessa telephoned Ms Swanepoel at about 11h00 from Sheryl's office and informed her that she had to leave for Durban immediately – she had been requested by Sheryl to meet her at her office. Tessa was to fly to Johannesburg from Durban that evening. Ms Swanepoel's husband fetched Tessa from Sheryl's office and they (Ms Swanepoel and her husband) took her to the airport in Durban later that afternoon. Ms Swanepoel saw, in Tessa's possession, an Hibiscus Coast Municipality envelope with the words 'For Tessie for her air flight' written on it and containing R500. Sheryl had also given Tessa a warm coat which she referred to as 'a good luck coat'. Because Tessa's flight would arrive in Johannesburg at about 12 midnight Ms Swanepoel suggested that she telephone Sheryl and find out who would pick her up in Johannesburg. Tessa informed her that she would be met at the airport by Frank. Before she departed for Johannesburg Tessa handed to her mother Sheryl's business card.

[9] Ms Swanepoel testified that on 20 or 21 May 2008 Sheryl advised her over the telephone that Tessa had arrived safely at J F Kennedy Airport and gave her a telephone number on which she could contact her (Tessa). It appears that it did not strike her as odd that Tessa, who was supposed to work in London, had now arrived at J F Kennedy Airport. After trying unsuccessfully to contact Sheryl when Tessa was due to return home, Ms Swanepoel eventually received a telephone call from Sheryl who reported that Tessa would arrive in Johannesburg on 4 June 2008. But Tessa did not arrive on that date and Ms Swanepoel was thereafter again unsuccessful in her attempts to call Sheryl. She eventually received a telephone call from Tessa at around 12 midnight on Friday, 13 June 2008. Tessa reported to her that she had been arrested in Sao Paulo for drug trafficking. Ms Swanepoel had earlier, after 4 June 2008, called and spoken to Tessa while the latter was in Peru, using a number from which Tessa had called her even before the last-mentioned date. Tessa had reported to her, as a reason why she had not returned home, that there had been excuses that flights were full. After she had received the news of Tessa's arrest Ms Swanepoel called Sheryl, who promised to call her back the next morning. Sheryl indeed called her as promised and told her that the Brazilian Embassy would contact her, which never materialised.

[10] During September/October 2008 Ms Swanepoel visited Tessa at the prison where she was held in Brazil. She was accompanied by her nephew, Mr Richard Olsen. She returned with some of Tessa's clothes and other belongings, which included her mobile phone, two sim cards (one from Peru and the other from Colombia), a suitcase (which was not the one she left with) and a South African sim card. These were handed to her by the prison authorities in Brazil. Back in South Africa Ms Swanepoel went through Tessa's diaries and, having obtained her password, she downloaded all the data messages (e-mails) that were exchanged between Tessa and Sheryl. She also went through all the messages exchanged between the two through sms and wrote them down – Tessa had given her PIN number for her mobile phone to Ms Swanepoel when the latter was in Brazil. All this information was taken by Ms Swanepoel to the police in Cape Town and thereafter to the offices of the Scorpions in Cape Town, together with another mobile phone that Tessa had left behind at home when she went to Johannesburg.

[11] On 18 June 2008 Sheryl telephoned Ms Swanepoel during the afternoon and enquired as to whether she knew a Richard Olsen, to which Ms Swanepoel answered in the affirmative, stating that Olsen was her nephew. Sheryl then remarked that she did not like to speak to strangers. Whilst she was in Cape Town Ms Swanepoel enquired from Sheryl, over the telephone, about certain names, including the name 'Frank'. Sheryl replied that she did not know the names and stated further that she had not known that Tessa had been in Colombia or Peru.

[12] Tessa's boyfriend, Mr Hendrik Claassen, also testified and confirmed certain of the evidence of Ms Swanepoel in relation to a work opportunity in London offered to Tessa by Sheryl. He had accompanied Tessa to Sheryl's office in Uvongo, where the work opportunity was discussed. Another witness was Lieutenant Colonel Izak Ludick who was the investigation officer in the case, appointed as such by the Director of Public Prosecutions on 6 January 2010. He visited Tessa in prison in Brazil and obtained her password from her so as to gain access to her e-mails. He subsequently compiled a record of e-mails exchanged between Tessa and Sheryl, which was handed in at the trial as Exhibit "H". Its admissibility in evidence, in terms of section 15 of the Electronic Communications and Transactions Act,[1] as a true record of e-mails exchanged between the two was formally admitted by both appellants.

[13] The appellants did not testify. They made certain formal admissions, one being the following:

'Accused No. 1 [Sheryl] deposed to an affidavit in support of her application to be released on bail. At these proceedings, the Court complied with the provisions of section 60(11B)*(c)* of the Criminal Procedure Act, 1977.

Accused No. 1's affidavit (Exhibit "E") is admissible in evidence in these proceedings.'

In that affidavit Sheryl alleged that she got to know Frank through an old acquaintance, Nikkie, with whom she had worked for two years at Medscheme in Johannesburg until

[1] Electronic Communications and Transactions Act 25 of 2002.

1999. In the course of one of their many discussions Nikkie told her that she was in a relationship with a man called Frank, who was a millionaire, and that she and Frank would visit her in Port Shepstone to discuss business. That visit eventually came true and from it a good relationship developed between her and Frank, to the extent that they called each other ‘my brother’ and ‘my sister’ respectively. Early in 2008 she received a telephone call from either Frank or Nikkie, who told her that Frank ‘was experiencing problems with his company’ as it had a predominantly African staff; and that Frank wanted to employ white persons, preferably females, to head his company and who would help him communicate well with white business. Frank therefore sought her assistance to refer to him people that she trusted.

[14] Sheryl alleged further that subsequently she told Charmaine, whom she had befriended previously, about the offer. Charmaine had apparently expressed a desire to move to a better job – she had complained about money at the massage parlour where she was employed. She expressed an interest in meeting Frank in Johannesburg and, because the ‘job’ had a prospect of taking her overseas, she quickly got her travel documents in order. Subsequently and on a certain day she (Sheryl) received a telephone call from Charmaine who told her that she was back from Johannesburg and that she did not like the business there. A meeting was then arranged and the two met at a coffee shop where Charmaine only told her that she had been treated badly in Johannesburg. It appears that thereafter the friendship between the two became frosty.

[15] As to Tessa, Sheryl averred in her affidavit that the former is her friend who had been her next door neighbour. She said when they met in 2007 Tessa informed her that she was living with her parents and that her mother was very strict and did not want her to leave home to live elsewhere, especially in Johannesburg. I consider it necessary to quote the following relevant paragraphs from the affidavit:

‘13.15 When Nikkie or Frank (I am not sure exactly who was it although I think it was Nikkie), indicated that Frank needed Whites to work in his firm, I connected Tessa to Nikkie.

13.16 Tessa then said I should speak to her parents and never mention that she was going to work in JOHANNESBURG but in LONDON. She feared that if she were to approach the parents herself

they would refuse. If I did not intervene her parents would not agree.

13.17 I did intervene as planned and the parents agreed because they trusted me.

13.18 . . .

13.19 After Tessa had left for JOHANNESBURG Frank phoned. He was furious and he stated that Tessa could not head his company as she had only standard seven and not matric. He was then going to find her another position. I was surprised that Tessa had lied to me about her academic qualifications.

13.20 Later on Frank and Tessa phoned and said Tessa was going overseas to do the work. This was a bit of a surprise for me because Frank had dubbed Tessa useless.

13.21 Thereafter Frank kept me updated about the various places Tessa would go to and I, at one stage, jokingly said I was jealous.

13.22 There was a lull of some sort when I heard nothing about Tessa. I then asked Frank where Tessa was and he said she was overseas.

13.23 Thereafter Tessa started communicating and said she was in South America and had found a French boyfriend and was going to Peru. She was looking for other work and if people phoned for references I should say she was my PA and earned R10 000. She said I should not disclose to Frank that she was looking for other work because she was still employed by him.

13.24 Subsequently she communicated with me and I could detect that she was really confused either because of depression or of something I did not know.

13.25 She repeated her story about being my PA and so on and suddenly when I asked her what she was actually doing, she said she was waiting and fed up; she wanted to come back home.

13.26 I then told her that she should not talk to people as she would end up getting into trouble. I said this because I detected confusion in her conversation and because of the fact that she wanted me to give a false reference.

13.27 I then communicated with Frank and expressed my deep concern that a person who had left her parents through me appeared to be stranded in a foreign land.

13.28 Frank told me that he was trying to make contact with her but was failing to do so. His telephone could not connect and the e-mails he was sending were bouncing back.

13.29 . . .

13.30 Because I wanted Tessa to get out of a desperate situation I told Frank to send whatever he wanted communicated to Tessa to me so that I could forward it to Tessa.

13.31 He obliged and I then served as a conduit pipe between the two of them.

13.32 . . .

13.33 I later on learnt that Tessa had been arrested for drugs.

13.34 I was devastated because I never imagined that Tessa could be associated with drugs. I did not know how I could face her parents thereafter.'

[16] This statement by Sheryl is of course evidential material but is untested. Much of it, particularly the part relating to the communication between her and Tessa while the latter was abroad, is confirmed by the contents of data messages (e-mails and sms texts), records of which were handed in to court as Exhibits 'H' (e-mails) and 'J' (sms texts) respectively. The appellants formally admitted the contents of each of these exhibits as a true record of data messages exchanged between Sheryl and Tessa 'at the times and on the dates specified' and that they were admissible in evidence in terms of the provisions of s 15 of the Electronic Communications and Transactions Act. They also admitted, formally, Exhibit 'F' as a true record of landline calls made by Sheryl from her office telephone to Frank's two mobile phones and to Tessa. The dates, times and duration of the calls were admitted as having being correctly reflected in the record.

[17] In the trial court the State initially succeeded in its application to introduce into evidence the contents of Exhibit 'R', viz transcripts of a number of communications made through Frank's two mobile phones and which were intercepted or monitored over the period 29 April to 16 June 2008. The appellants' objection to the admissibility of the evidence was later upheld and the evidence excluded on the ground that it had not been established that the source from which the transcripts were made was the original recording. Proof of the authenticity and reliability of the transcripts was therefore found to be lacking. In this court counsel for the State urged us to reverse the decision of the trial court relating to the admissibility of this evidence. It was also argued, on behalf of Sheryl, that there is no reason why the contents of Exhibit 'R' should not be considered by this court. Her counsel contended that without Exhibit 'R' there is even less evidence against Sheryl. In the view I take of this matter, and as will appear later in this judgment, it is not necessary to revisit the point.

[18] In the summary of substantial facts attached to the indictment it is alleged that prior to the events in question the two appellants 'entered into a conspiracy in terms of which they would import cocaine from beyond the borders of South Africa' and that at all material times they 'acted in execution of a criminal conspiracy and/or common purpose to commit the offences mentioned in the indictment'. I agree with counsel for the appellants that there was no direct evidence of the conspiracy or of an agreed arrangement between the

appellants, nor was there any admissible evidence of interaction between them which directly evidences such conspiracy and thus the agreement. In the absence of direct evidence implicating the appellants the State's case rested on circumstantial evidence. Recognising this fact the trial court posed the question whether the appellants' guilt was the only reasonable inference to be drawn from the proved facts. It answered that question in the affirmative.

[19] In *S v Reddy & others* 1996 (2) SACR 1(A) this court said the following regarding the assessment of circumstantial evidence:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202–3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".'[2]

The State must therefore satisfy the court, 'not that each separate fact is inconsistent with the innocence of the [appellants], but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence'.[3]

[20] In her affidavit Sheryl stated categorically that she 'never knowingly participated in any drug trafficking, conspiracy or incitement to deal in drugs as set out in the indictment or at all'. Her counsel argued accordingly that although Charmaine's evidence that Sheryl informed her that she was to bring back a packet for Frank from Turkey was not challenged, there was no suggestion as to what the contents of the packet would be. The sum total of counsel's submission, therefore, was that there was no evidence before the trial court that Sheryl knew what the substance was that Tessa was to bring back into the country. As to Frank, his counsel submitted in the heads of argument that the inferences which the trial court drew were either a non sequitur to the proved facts or the trial court

[2] At p 8*c-e*.
[3] *R v De Villiers* 1944 AD 493, particularly at 508 –509.

overlooked the possibility of other inferences which were equally probable or at least reasonably possible. Counsel argued further that in an attempt to explain the facts the trial court overlooked inconsistent circumstances, assumed the existence of facts which had not been proved and could not legitimately have been inferred.

[21] That there was an agreement between the appellants that Sheryl would provide Frank with white female persons whom the latter could send on missions overseas cannot legitimately be contested. Clearly, the approaches by Sheryl to both Charmaine and Tessa with job offers came, according to Sheryl's affidavit, after Frank had asked her to do so. On Charmaine's evidence, which must be preferred over Sheryl's untested statement, Sheryl offered her a work opportunity overseas. She said that Sheryl informed her that a firm or company in which her brother, Frank, was a partner, sourced the work overseas. Indeed, Sheryl alludes to this in her affidavit where she states that Charmaine 'was particularly livid (excited?) about the fact that her job had the prospect of taking her overseas and she hastened to have her travel documents in order'. With regard to Tessa, Sheryl sent her a text message on 3 May 2008 instructing her to bring her passport during the afternoon of the next day.[4] Another text message sent on 4 May 2008 says:

'Plz bring ur passport back at shelly beach.'

At 11h32 on 14 May 2008 Sheryl sent the following text message to Tessa:

'Please stay ready flights are full, busy trying Holland in Europe. Will get back 2 u!'

On 14 May 2008 she again sent a text message to Tessa that reads:

'The money is already here in my office u need to go 2 Joburg 2day 4 ur visa.'

And the following message was sent on 15 May 2008 at 8:48pm when Tessa was already in Johannesburg:

'Frank is the one handling ur trip and is usually very busy but very reliable just relax and enjoy tell him 2 bring u books and magazine.'

These messages and Charmaine's evidence clearly show that Sheryl knew all along that Tessa and Charmaine would be required to embark on trips overseas and were not going to work for Frank in a company in Johannesburg. I agree, therefore, with the trial court's rejection of Sheryl's version that Tessa was to work in Johannesburg on the basis that the

[4] The text reads : 'We're on our way 2 PMB back 2moro plz bring ur Passport 2moro afternoon. Have a grate day.'

'contents of the sms's simply do not accord with, in fact contradict her version, that Tessa was destined to work in Johannesburg'.

[22] The next question to be considered is whether Sheryl knew what the purpose of the overseas trips was. It is surely significant that the nature of the 'work' was never disclosed to the state witnesses and Sheryl did not use the opportunity to put an innocent colour on the offer. On Charmaine's version Sheryl told her upon enquiry that she merely had to collect a packet for Frank in Turkey. She had also told Charmaine that she would be paid R25 000 for the work that she was required to do, that is to collect the packet for Frank. It may of course be argued, correctly so, that there was no evidence as to what the contents of the packet would be. But one wonders why, as Charmaine also observed, a packet could not be sent by courier service which is available internationally, unless, of course, the contents were so valuable to the person concerned that he/she would not take the risk of the packet getting lost or damaged. As to Tessa, it is important to note that on 2 May 2008 Sheryl informed her by way of a text message through her mobile phone that she (Sheryl) wanted to discuss a business venture with her.[5] She was also informed by Sheryl that she would receive R25 000.[6] Sheryl's counsel conceded before us that Sheryl knew that the business venture that was to involve Tessa was unlawful. That concession was wisely made, in my view. But counsel persisted with his argument that even though that may be so, there was no evidence that Sheryl knew what the substance was that Tessa was to bring into the country.

[23] While she was waiting in Peru for instructions pertaining to her return home Tessa showed some frustration. On 6 June 2008 she sent an e-mail to Sheryl saying, among other things, the following:

'I am ok, chatting to my friends on messenger, waiting for a reply from you and Frank and wanting to go home!

. . .

Otherwise I am still freezing my butt off in Peru, with Frank that is telling me to wait and wait and wait, and then when it's time to go I am ready and they cancel everything again.

. . .

[5] The message reads: 'Tessa Hi its Sheryl, haven't spoken 2 u in a long time. I would like 2 talk with [u] about a business venture plz indicate how we can meet?'

[6] By text message on 19 May 2008 sent at 4:50pm.

So has Frank told you when I am leaving??? or don't you know? . . .'

Sheryl responded on 8 June 2008 as follows:

'Hi Tess

. . .

Frank told me about the delay which is for your own good really.

. . .

I understand you are coming back on Monday/Tuesday?

Keep well and avoid people who may end up asking a lot of questions.

See you soon, hang in there.

Sheryl Cwele.'

She had, on 4 June 2008, sent to Tessa by e-mail, her flight details for her return from Lima, via Sao Paulo, to Johannesburg. It would be difficult to understand, if Sheryl was unaware of the fact that Tessa was overseas for an unlawful purpose, why she would convey to Tessa that the delay was for her own good and that she should avoid people who might ask questions. But the question still is whether she knew that what Tessa was to bring back into the country was cocaine.

[24] It is common cause that cocaine was found in Tessa's luggage at the airport in Sao Paulo where she was arrested while on her way back to South Africa. There was no evidence of anything else illegal found on her. She had clearly gone overseas to collect and bring back something illegal for Frank; he is the one who paid for her flights and arranged her accommodation while overseas. That much was conceded before us in argument. It is inconceivable that she would thereafter return to South Africa with something other than that which she was tasked to collect. For, plainly she did not have the financial resources or wherewithal to have concluded a transaction involving cocaine on her own in South America. And the complete absence of interest by the appellants at the time in the fate of the commodity she was supposed to bring back to South Africa is inexplicable. It follows that Tessa was sent to South America by Frank to collect cocaine and to bring it back to South Africa. That is the only reasonable inference to be drawn from the totality of the proved facts. Frank's appeal against his conviction must accordingly fail.

[25] The same applies to the case of Sheryl, in my view. She recruited Tessa and worked closely with Frank in arranging her return trip to South Africa. She even assured

Tessa that the delay in her travel arrangements was for her own good, an indication, in my view, that she had knowledge of the dangers associated with the trip. As has been mentioned above, she knew that Tessa was required to bring back something which it is unlawful to possess. Tessa was thereafter arrested with cocaine in her possession. The inference is irresistible, therefore, that Sheryl knew that the unlawful substance that Tessa was required to bring back was in fact cocaine. Neither of the appellants testified. Whilst that is their right, it is not without its consequence, particularly in a situation such as this, where the evidence adduced by the State calls for a response. Before us it was submitted that the unlawful criminal enterprise (which was readily admitted) may in fact have had as its goal the smuggling into this country of some other unlawful substance and not cocaine. But absent evidence, that, as counsel was constrained to concede, amounted to no more than a speculative hypothesis. Sheryl's false statement in her affidavit that she recruited Tessa (and Charmaine) to head Frank's company in Johannesburg strengthens that view. It follows that an agreement existed between her and Frank that she would recruit white women to be used by Frank to travel overseas and to bring cocaine back into the country.

[26] I turn to the question of sentence. As I have indicated above, the State gave notice in its original heads of argument that it would seek an increase of the sentence of 12 years' imprisonment imposed by the trial court to 15 years' imprisonment. After this court's judgment in *Keyser v S* [2012] ZASCA 70[7] that stance changed and an increase of the sentence to 20 years' imprisonment was sought. In *Keyser* the appellant, a 35 year old married man, had been convicted by a regional magistrate of dealing in 6545 grams of cocaine in contravention of s 5*(b)* of the Act and sentenced to imprisonment for 20 years. He had been arrested after boarding a flight to Cape Town at the Johannesburg International Airport (now OR Tambo International Airport) having earlier arrived on a flight from Sao Paulo, Brazil. The sentence of 20 years' imprisonment was confirmed on appeal to the South Gauteng High Court. On further appeal this court, having found the appellant not to have been a mere courier, but a willing and informed participant, also confirmed that sentence, although it observed that it was 'undoubtedly a heavy one'.[8]

[7] Delivered on 25 May 2012.
[8] Para 30.

[27] In the present matter the indictment made reference to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 and Part II of Schedule 2 to that Act (the minimum sentence legislation). Those provisions, read together, provide that for a contravention of s 5*(b)* of the Act a minimum sentence of 15 years' imprisonment must be imposed on a first offender if it is proved that the value of the dependence-producing substance in question is more than R50 000, or more than R10 000 if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. That sentence may of course be departed from where the sentencing court is satisfied that substantial and compelling circumstances exist justifying the imposition of a lesser sentence than the one prescribed by the minimum sentence legislation. On the other hand s 17*(e)* of the Act provides for imprisonment 'for a period not exceeding 25 years . . .' for a contravention of s 5*(b)*.

[28] The trial court accepted the uncontested evidence of Lieutenant Colonel Ludick that the cost of cocaine at the time was R20 000 per kilogram, with a street value of R200 per gram. The total street value was thus approximately R2 million. Furthermore, I have found that an agreement existed between the appellants to use other persons to travel overseas and to bring back cocaine into the country. The recruiting of Tessa was in furtherance of a common purpose to import cocaine into the country. The provisions of the minimum sentence legislation accordingly apply in considering an appropriate sentence.

[29] In *S v Malgas* 2001 (1) SACR 469 (SCA) this court, dealing with the minimum sentence legislation, said that when considering sentence the emphasis must shift to the objective gravity of the type of crime and the public's need for effective sanctions against it. And as to the determination of substantial and compelling circumstances Lewis JA explained what was said in *Malgas* as follows in *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 16:

'This court, in *S v Malgas*, held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified , and that there should be truly convincing reasons for a different response. It is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those

factors traditionally taken into account in sentencing – mitigating factors. Of course these must be weighed together with aggravating factors. But none of these need be "exceptional".' (Footnote omitted.)

And, as Marais JA reminds us in *Malgas*, a court exercising appellate jurisdiction 'cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court'.[9] But an appellate court may interfere with the exercise by the sentencing court of its discretion even in the absence of a material misdirection when the disparity between the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the trial court is 'so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"'.[10]

[30] The trial court recognised, when it considered sentence, that the starting point is the 15 years prescribed by s 51(2) of the minimum sentence legislation. It then proceeded to set out the mitigating factors relevant to each appellant. In respect of Sheryl they include the following: She was a 50 year old first offender at the time of the trial and had had no previous brushes with the law. She was married with four children aged 25, 21, 19 and 17 years respectively. She had a stable background and a stable family, with the benefit of ownership in a residential dwelling with a value in excess of R1,2 million. She was also in stable employment with the Hibiscus Coast Municipality where seven departments were under her control. By profession she is a qualified nurse with an honours degree in nursing. As to Frank, the trial court considered that he was, at 42 years of age, a first offender. He had been married since 1999 and had two children aged nine and four years respectively. The trial court also considered as relevant in Frank's favour the fact that unlike Sheryl, he did not put up a false version in his defence, but merely exercised his constitutional right to require the State to prove its case against him. Another factor was that by the time the trial was finalised he had been in custody for a period of 15 months.

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[9] Para 12.
[10] See fn 9 above.

[31] As to the offence, the trial court observed that the appellants were convicted of a very serious offence; that the lives of drug addicts are often destroyed by their addiction, the effects of which are not normally felt by the addicts only, but also by the members of their families and that society therefore 'needs to be protected [from] those who might consider making it their business to import these drugs . . .'. The court, however, did not consider these factors to be of an aggravating nature. But as against Frank, the court reasoned that the fact that he was responsible for payment of remuneration and arranging flights for Tessa and Charmaine and paying therefor, outweighed the mitigating effects of him having been in custody for 15 months and the fact that he did not put up a false version before the court. With regard to Sheryl, the trial court found that she played a lesser role than that played by Frank, although her role was nevertheless important and significant. Her prospects of rehabilitation, therefore, appeared to be good, it said. The court accepted that 'similar considerations should possibly also be attributed to [Frank]'. It ultimately considered 'these aforesaid considerations to be sufficiently compelling and substantial to permit [it] to deviate from the minimum sentence prescribed by [the minimum sentence legislation]'.

[32] Counsel for the State contended that there was nothing extraordinary about Sheryl that called for a lesser sentence than that ordained by the Legislature and that there are in fact several aggravating circumstances that the trial court overlooked. These are that Sheryl would no doubt have learned, during her studies towards a nursing qualification, of the dangers associated with hard drugs; that she put up a false version and shied away from cross-examination and that she showed no remorse. In addition, counsel submitted that the trial court should have considered as aggravating the fact that Sheryl abused her office by using the municipality's telephone and other resources, such as data message facilities, in the commission of the offence. In respect of Frank, counsel argued that the time spent in custody while awaiting the finalisation of the trial was of his own making and thus should not redound to his benefit.

[33] It is in my view unnecessary to consider the question whether the trial court misdirected itself when it considered the existence or otherwise of substantial and compelling circumstances. This is because I consider the disparity between the sentence imposed by the trial court and that which this court would have imposed had it been the

trial court to be so marked that it can properly be described as disturbingly inappropriate. Our courts have frequently expressed themselves on the seriousness of the crime of dealing in cocaine, or importing it into this country. In *S v Homareda* 1999 (2) SACR 319 (W) Cloete J (Robinson AJ concurring) said:

'The type of offence of which the appellant stands convicted has the potential to ruin the lives of families in South Africa.
The aggravating factors are that it was cocaine, and a substantial (although not an excessive) quantity thereof – 300 grams – which was brought into South Africa in condoms which he had swallowed; and drug trafficking of this nature is on the increase, to such an extent that it has been considered necessary to establish a branch of SANAB at Johannesburg International Airport, where the appellant entered this country.'[11]

In *S v Jimenez* 2003 (1) SACR 507 (SCA) Olivier JA, in a separate concurring judgment, made the following comment after having referred to the judgment of Steyn AJ in *S v Sebata* 1994 (2) SACR 319 (C):

'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. . . .'[12]

And in *Keyser* Heher JA observed that while the street value of the cocaine in that case was materially more than that in *Jimenez*, 'more important is the number of lives potentially affected by the use of the drug' and that 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'.[13]

[34] What may be added to these pertinent comments is the fact that in most cases the courier or 'mule' is caught, while the handler (the real dealer or importer) remains safe in the background, to carry on with his/her evil deeds. In the present matter, it was only

[11] At 326*h–i.*
[12] Para 25.
[13] Para 30.

through the courage and determination of Tessa's mother that the real culprits have been brought to book. The comments and observations made in the judgments referred to above apply equally, if not more, to them and the effects of their deeds on the community at large far outweigh their personal circumstances and justify a long term of imprisonment.

[35] In *Keyser* a courier who illegally brought into the country 6545 grams of cocaine with a street value of at least R2 million was sentenced by a regional magistrate to 20 years' imprisonment, which sentence was confirmed on appeal to the South Gauteng High Court and subsequently by this court. In *Homareda*, a courier, who had pleaded guilty to dealing in cocaine worth R90 000, was sentenced by a magistrate to 15 years' imprisonment. That sentence was reduced on appeal to 10 years' imprisonment. In *Jimenez* a sentence of 12 years' imprisonment for 653,4 grams of cocaine was imposed by a magistrate and confirmed on appeal by the Johannesburg High Court and later this court. In the present matter cocaine with a street value of more than R2 million was involved. It may well be, as the trial court found, that Sheryl played a lesser role in the whole enterprise, but I agree with counsel for the State that as a qualified nurse she must have known the dangers inherent in the use of drugs. Yet she was a willing partner in the commission of the crime, who befriended and preyed on vulnerable women in furtherance of the criminal enterprise. I consider that the trial court was correct in treating the appellants equally.

[36] For all these reasons I am of the view that a term of imprisonment for 20 years is an appropriate sentence in the circumstances. The disparity between that sentence and the one of 12 years' imprisonment imposed on each appellant by the trial court is so marked that it can properly be described as disturbingly inappropriate. This court is accordingly at large to impose sentence afresh.

[37] In the result, the following order is made:

1 The appellants' appeals against their convictions are dismissed.

2 The sentences imposed by the trial court are set aside and replaced with a sentence of 20 years' imprisonment in respect of each appellant.

3 In respect of the second appellant the sentence is antedated to 6 May 2011.

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L Mpati
President

Appearances

First Appellant:	K J Kemp SC Instructed by: Ngubane & Partners Inc, Durban N W Phalatsi & Partners, Bloemfontein
Second Appellant:	J L C J van Vuuren SC Instructed by: Shaun Hamilton Attorneys, Johannesburg Symington & De Kok Attorneys, Bloemfontein
Respondent:	I P Cooke, (with him A A Watt) Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein