THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 73/2002

In the matter between :

ARIAS JIMENEZ **Appellant**

and

THE STATE **Respondent**

Coram: **OLIVIER, CAMERON JJA *et* LEWIS AJA**

Heard: **5 NOVEMBER 2002**

Delivered: **21 FEBRUARY 2003**

Summary: **Dealing in drugs – Sentence – Relevant factors**

J U D G M E N T

LEWIS AJA:

[1] This appeal is against a sentence of twelve years' imprisonment imposed on the appellant by the Johannesburg High Court (per Andre Gautschi and Kuny AJJ). That court itself dismissed an appeal against a twelve-year sentence handed down by a district court, but considered that the lower court had misdirected itself in a material respect, and that as an appeal court it was at large to impose a new sentence. The judgment of the court *a quo* is reported (twice, for no apparent reason) *sub nom S v Arias* 2002 (1) SACR 518 (W); and *sub nom S v Jimenez* 2002 (2) SACR 190 (W). This further appeal is brought with the leave of the court below. References to the reported judgment are to 2002 (1) SACR 518.

[2] The court below was concerned principally with the application of provisions of the Criminal Law Amendment Act 105 of 1997, requiring the imposition of minimum sentences in respect of the commission of certain offences. The appellant had been charged and tried in a district court for contravening s 5(b) of the Drugs and Drug-Trafficking Act 140 of 1992, in that he had brought into the Republic 60 'bullets' of cocaine – that is, condoms filled with cocaine -- that he had swallowed before boarding an aeroplane to come to South Africa. It was alleged that the weight of the cocaine was 653,4 grams and its value R210 000. The appellant had pleaded guilty to the charge, and in so doing it was assumed, apparently, both by the trial court and the court below, that he had admitted not only the weight but also the value of the cocaine.

[3] The magistrate, after convicting the appellant, sentenced him on the basis that he was bound to impose a minimum sentence prescribed under the Criminal Law Amendment Act. The pertinent section (s 51(2)(a) read with Part II of Schedule II) requires the imposition of a sentence of at least 15 years' imprisonment in the case of

a first offender found guilty of dealing in a dependence producing drug the value of which exceeds R50 000 unless there are substantial and compelling circumstances that warrant the imposition of a lesser sentence (s 51(3)(a)). However, s 51(2) expressly states that '*a regional court or a High Court*' shall be bound to impose the prescribed sentences. There is in the section no reference at all to the *district* magistrates' courts. The magistrate in this matter considered, however, that there was an obvious lacuna in the Act; that it must have been the intention of the legislature that all courts trying offences of the same nature should have the same sentencing powers and obligations; that under the Drugs and Drug Trafficking Act the jurisdiction of district magistrates' courts had already been substantially increased, and that it therefore made no sense that a district court could impose a sentence of up to 25 years' imprisonment for an offence, whereas a regional or a high court would be bound to impose a minimum sentence of 15 years.

[4] On appeal the high court considered that the magistrate had misdirected himself in concluding that he was bound to impose a minimum sentence. The court considered that the legislation very clearly excluded district courts from the ambit of s 51 of the Criminal Law Amendment Act. I shall not repeat the reasoning of the court, nor the authorities adduced by Gautschi AJ in his judgment, since it is reported. Suffice it to say that I consider the judgment to be correct in finding that *district* magistrates' courts are not bound to impose the minimum sentences prescribed. That the legislation results in anomalies, and probably even injustice in that sentences imposed for the same offences may be different, depending on the court in which the accused is charged and tried, is most unfortunate. But that does not permit a court to interpret the section in such a way as to change the express sphere of its application.

The anomalies should, however, be brought to the attention of the appropriate authorities.

[5] Because the court below found that the trial court had misdirected itself in imposing a sentence in terms of the Criminal Law Amendment Act it considered that it was at large to impose a sentence itself. After a careful examination of a number of factors that court also imposed a sentence of twelve years' imprisonment. It is in fact against this sentence that the appeal before us lies (*S v Makhudu*, a decision of this court, as yet unreported, 16 May 2002, Case No 208/01.)

[6] Counsel for the appellant argued before us that, on a comparative assessment of other sentences imposed for the commission of similar offences, the sentence was disturbingly inappropriate. Indeed, it is somewhat higher than sentences imposed recently in similar circumstances: see, for example, *S v Hightower* 1992 (1) SACR 420 (W); *S v Randall* 1995 (1) SACR 559 (C); *S v Opperman* 1997 (1) SACR 285 (W); *S v Homareda* 1999 (2) SACR 319 (W); and *S v Mkhize* 2000 (1) SACR 410 (W) where the sentences for trafficking in drugs have ranged from an effective period of five to ten years' imprisonment. Counsel was hard pressed to argue that there was a shocking disparity between these sentences and the sentence of 12 years imposed on the appellant. Furthermore, while it may be useful to have regard to sentences imposed in other similar cases, each offender is different, and the circumstances of each crime vary. Other sentences imposed can never be regarded as anything more than guides taken into account together with other factors in the exercise of the judicial discretion in sentencing.

[7] However, even where a sentence does not seem shockingly inappropriate, a court on appeal is entitled to interfere, or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion. (See for example *S v Petkar* 1988 (3) SA 571 (A); *S v Siebert* 1998 (1) SACR 554 (SCA).)

[8] This court raised with counsel the question whether the court below did misdirect itself in an important respect – by having regard to the minimum sentences prescribed by the legislature in the Criminal Law Amendment Act. It is clear that the court below considered that the appellant was 'in the position' of one who has been convicted under that legislation. Gautschi AJ stated (at 523h—524a):

> 'In the light of those cases [*Homareda* in particular], a fitting sentence may have been 10 years' imprisonment. However, we must approach the imposition of sentence conscious that the Legislature has, by ordaining minimum sentences, indicated that offenders in the position of the appellant are to be dealt with severely. The sentences imposed in the cases referred to in *Homareda's* case are useful as guidelines, but must be seen to be on the light side in view of the message sent out by the Legislature in prescribing minimum sentences. The sentence in *Homareda's* case was based on a value of cocaine which was less than half of that in the case of the appellant.
>
> 'Although there are compelling mitigating circumstances, . . . the seriousness of the crime, the fact that it is premeditated, its prevalence and the need for deterrence to combat the evils of drug dealing (as ordained by the Legislature), must of necessity outweigh the personal circumstances of the appellant.'

[9] There is no doubt that in the exercise of the sentencing discretion a court should have regard to public policy and the public interest. The expression of policy in a statute – as in the Criminal Law Amendment Act – is most certainly a factor that should be taken into account. Indeed, that statute shows the disquiet experienced by the public, represented through the legislature, at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of

the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised. In an oft-cited dictum Rumpff JA said in *S v Zinn* 1969 (2) SA 537 (A) at 540G—H that what must be considered 'is the triad consisting of the crime, the offender and the interests of society'. The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act, which includes drug trafficking where the value of the drug exceeds a certain amount. Part II to Schedule II specifies a contravention of certain provisions of the Drugs and Drug Trafficking Act where the value of the 'dependence-producing substance' exceeds R50 000 (the offence in respect of which the appellant was convicted), or where it exceeds R10 000 and the offence was committed by a group of persons 'acting in the execution or furtherance of a common purpose or conspiracy'.

[10] While, however, it may be appropriate for a judicial officer to attach significant weight to the existence of prescribed minimum sentences even where he or she is not bound by the provisions of the Act, as is the case here, it is proper to do so only where the offence at issue is one that would be governed by the provisions of the statute if the court had jurisdiction. In this case there was no evidence adduced before conviction as to the value of the cocaine that had been smuggled into the country by the appellant. The absence of such evidence was a function no doubt of the appellant's plea of guilty to the charge. After the appellant was convicted the magistrate merely confirmed with his legal representative that the appellant did not dispute the value of the cocaine as being R210 000.

[11] This court has recently held (*S v Legoa* 2003 (1) SACR 13 (SCA)) that the Criminal Law Amendment Act 'requires that an accused must have been "convicted of an offence referred to" in the Schedule [II]', namely dealing in a dangerous

dependence-producing substance ‘if it is proved that . . . the value of the dependence-producing substance is more than R50 000’ (para 13). Further, held the court, a court acquires an ‘enhanced penal jurisdiction’ ‘only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence . . . ‘ (para 18). See also *S v Nziyane* 2000 (1) SACR 605 (T), where the court came to the same conclusion in so far as the offence of being in possession of a semi-automatic weapon was concerned: the state must prove the nature of the weapon before conviction in order for the minimum sentence to be imposed under the Act.

[12] Although the appellant pleaded guilty to the charge of dealing in cocaine described as weighing 653.4 grams, there was in fact no proof of the weight of the drug, and no admission or proof as to its quality or its value before conviction or even before sentence. Nor was the appellant ‘convicted’ of an offence covered by the minimum sentence legislation. The procedure the trial court adopted, in eliciting an admission as to value after conviction, meant that the value in issue did not form part of the offence in respect of which the appellant was convicted. It follows that, even if the appellant had been tried in a regional or high court, the value of the cocaine had not been proved by the state before conviction. Hence, all the elements of the scheduled offence would not have been proved and those courts would accordingly themselves not have had jurisdiction to impose the minimum sentence. In the circumstances, the minimum sentencing legislation should not have been accorded undue weight in determining the appropriateness of the sentence in this case. Indeed, the court below was wrong in concluding that the appellant was ‘in the position’ of one who had been convicted under that legislation.

[13] Was this misdirection material, such as to justify interference by this Court? The prescribed minimum sentences were clearly regarded by the court below as only one of several factors to be taken into account in imposing sentence. A number of other issues were carefully considered. These included the mitigating factors that the appellant is a first offender; was only 24 years of age at the time when the offence was committed; and has a wife and young daughter living in Colombia, of which he is a citizen. He has no family in South Africa, and therefore no familial support while he serves a sentence of imprisonment. He submitted in a statement to the trial court that the reason for bringing drugs into the country was to earn money to pay for a prosthesis for his brother who had been severely injured through being electrocuted in an accident. The truth of this statement was not challenged since no oral evidence was led. Nor, however, was it placed in dispute. It was also argued that the appellant had shown remorse by pleading guilty. The court below correctly accorded little if any weight to this factor given that in effect the appellant had been caught in such a way that he had had no choice but to plead guilty. Similarly, the argument that he had cooperated with the police was not accepted since the extent of the cooperation was not demonstrated in any way.

[14] Thus, although the court below was incorrect in assuming that the appellant was convicted of an offence described in the minimum sentencing legislation, that assumption was not accorded undue significance. The court was fully aware that it was not bound by that legislation; indeed that was the major thrust of its finding. And it was entitled to take general account of the policy embodied in that legislation, and did so properly. I find, accordingly, that there was no material misdirection on the part of the court a quo in having regard to the existence of the minimum sentence legislation.

[15] The crime committed by the appellant is very serious indeed. Drug trafficking inevitably results in grave harm to others and courts should ensure that the sentences they pass have the requisite deterrent effect. The appellant's conduct thus warrants a lengthy sentence of imprisonment even though he is a first offender in a foreign country without any familial support.

[16] A consideration of sentences recently passed for drug trafficking in similar instances is, as I have said, of assistance only in so far as the sentences indicate a general trend and hence a measure of consistency. Because the imposition of sentence (except in so far as the legislature prescribes sentences) is a matter of judicial discretion, requiring a consideration of factors that are peculiar to each case, the appropriate sentence for the appellant is one that takes into account his personal position as well as the interests of society.

[17] In my view, a sentence of imprisonment somewhat shorter than that imposed might have been more appropriate. The crime is grave and its consequences serious, but the mitigating factors presented are significant. It cannot be said, however, that the sentence of 12 years' imprisonment imposed by the court below was disturbingly inappropriate, or that the court did not exercise its discretion properly. There is accordingly no basis on which to interfere with the sentence passed.

[18] The appeal is accordingly dismissed.

[19] The registrar is requested to bring this judgment to the attention of the Minister of Justice so that the anomalies that arise where an accused may be charged and

tried in a district, regional or high court, only the latter two courts being bound to impose minimum sentences, can be considered.

C H Lewis
Judge of Appeal

Cameron JA concurs

OLIVIER JA

[1] I have read the judgment prepared by my colleague Lewis AJA. Although we agree on the outcome of the appeal, I wish to set out my approach to the matter.

[2] The appellant was charged in the district court of Kempton Park with contravening s 5 (b) read with ss 1, 13, 17, 18, 20, 21 and 25 of the Drugs and Drug Trafficking Act 140 of 1992, as amended, and with s 51 the Criminal Law Amendment of Act 105 of 1997, in that upon or about 1 August 1999 and at or near Johannesburg International Airport in the district of Kempton Park the accused did unlawfully deal in a dangerous dependence-producing substance, to wit 653,4 grams cocaine, being a substance derived from coca leaves and thus

listed in part II of schedule 2 of Act 140 of 1992, by swallowing 60 bullets, *ie*, condoms containing cocaine, and bringing it into the RSA by aircraft.

[3] At the trial, the appellant pleaded guilty and his attorney, Mr Mphahlele, submitted a written statement in which the appellant admitted to the material details as charged.

On the strength of the appellant's plea of guilty and confession, he was found guilty as charged.

[4] Prior to sentencing, the accused's representative and the prosecutor addressed the court. The following dialogue between the court and Mr Mphahlele occurred:

'Court:	Mr Mphahlele, the state informs me that you do not dispute the value involved being R210 000,00?
Mr Mphahlele:	That is correct.
Court	So that is common cause.'

[5] In sentencing the appellant, the magistrate accepted that he was a first offender, youthful, a 23 year old Colombian citizen who is married with a four

year old daughter and currently a student at a university in Bogota. The magistrate also took into account that the appellant's remuneration for being a courier or 'mule' would be 5 000 US dollars (*ie* then approximately R50 000,00). The magistrate also noted the appellant's assertion - made through his attorney - that he had intended using a portion of his remuneration to buy a prosthesis for his brother who had lost a leg through an electrical accident.

[6] The magistrate was not convinced that the appellant had shown remorse, and found that he had been uncooperative both towards the court and the police. Acting in accordance with s 51 (2) of the Criminal Law Amendment Act 105 of 1997 and following the judgment in *S v Homareda* 1999 (2) SACR 319 (W) the learned magistrate imposed a sentence of 12 years' imprisonment.

[7] The appellant appealed to the Johannesburg High Court against this sentence. Andre Gautschi AJ summarised the magistrate's judgment on sentence as follows:

'The learned magistrate gave a lengthy judgment on sentence in which he found that, despite sitting as a district magistrate and not as a regional or High Court, he was obliged to impose a minimum sentence of 15 years' imprisonment unless he could find compelling and substantial circumstances which would justify a lesser sentence. He then found that the ordinary sentence for this type of crime would be approximately 10 years' imprisonment. This he found, following *S v Homareda* 1999 2 SACR 319 W, to be vastly different from the 15 years' minimum sentence imposed by the legislature, and therefore found that substantial and compelling circumstances existed to justify the imposition of a lesser sentence. He added "a bit more" than the sentence imposed on *Homareda* (which was 10 years' imprisonment) to personalise the sentence to the circumstances of the appellant and sentenced him in the result to 12 years' imprisonment. The appellant appeals only against the sentence.'

[8] The learned judge (with whom Kuny AJ concurred) held that the magistrate had misdirected himself in two respects, to wit

(a) that he was bound to impose a minimum sentence of 15 years' imprisonment unless there were compelling and substantial circumstances which would justify a lesser sentence. The court *a quo* found that the provisions of s 51 (2) of the Criminal Law Amendment Act 105 of 1997 are not applicable to a district court and that the magistrate was, therefore, not entitled to consider the

imposition of the minimum sentence of 15 years laid down in that statute;

(b) that, in any event, even if Act 105 of 1997 had been applicable, the magistrate erred in his application of the concept of 'compelling and substantial circumstances.'

[9] The court *a quo*, having found that the magistrate had erred, held that it was at large to impose a fitting sentence. The court then summarised the mitigating circumstances. The court also rejected counsel's argument that the appellant had shown remorse, or that he had co-operated with the police to a relevant degree. The court also had regard to previous comparable cases and continued:

> 'I have had regard to the sentences imposed in the cases to which we have been referred by Mr Karam, which are the cases referred to in *Homareda's* case at 327, and *Homareda's* case itself. In the light of those cases, a fitting sentence may have been 10 years' imprisonment. However, we must approach the imposition of sentence conscious that the legislature has, by ordaining minimum sentences, indicated that offenders in the position of the appellant are to be dealt with severely. The sentences imposed in the cases referred to in *Homareda's* case are useful as guidelines, but must be seen to be on the light side in view of

> the message sent out by the legislature in prescribing minimum sentences. The sentence in *Homareda's* case was based on a value of cocaine that was less than half of that in the case of the appellant.
>
> Although there are compelling mitigating circumstances, which I have listed above, the seriousness of the crime, the fact that it was premeditated, its prevalence and the need for deterrence to combat the evils of drug dealing (as ordained by the legislature), must of necessity outweigh the personal circumstances of the appellant. In all the circumstances a sentence of 12 years' imprisonment imposed by the learned magistrate, is in my view a fitting one and should be confirmed.'

[10] The present appeal lies against the sentence imposed by the court *a quo*, and not against the magistrate's judgment (see *Makhudu v The State*, case no 208 / 01 of this Court, as yet unreported, judgment delivered on 16 May 2002, para [3]).

[11] The judgment of the court *a quo* is reported as *S v Arias* 2002 (1) SACR 518 (W) as well as *S v Jimenez* 2002 (2) SACR 190 (W). In the first-mentioned report, the court *a quo* correctly in my view, held (at 519 j - 522 g) that the district court erred in finding that it was bound to impose a minimum sentence of 15 years' imprisonment unless there were compelling and substantial circumstances which would justify a lesser sentence. A district court is not

entitled to apply the minimum sentence provisions now under consideration; the Criminal Law Amendment Act 105 of 1997 is clear and unambiguous in this respect.

[12] The problem with the judgment of the court *a quo* lies in that part quoted in [9] hereof, and in particular in the reference to *S v Homareda* 1999 (2) SACR 319 (W). The point is that the sentence in *Homareda* was based upon the application of the relevant minimum sentence provisions. In general, it is not permissible to have regard, without the necessary caveats, qualifications and distinctions, to sentences imposed on the strength of minimum sentence provisions in a case where the minimum provisions are not applicable. The point of departure in prescribing maximum and minimum sentences differs substantially from that applicable to cases where no such provisions are prescribed; and equating without the necessary caveats, qualifications and distinctions the reasoning of the one with the other will often not be valid. (See

also the arguments in *S v Malgas* 2001 (2) SA 1222 (SCA).) In this sense, the court *a quo* can be said to have erred and misdirected itself.

[13] But it is trite law that a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with a sentence imposed by a lower court:

> ' ... it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: [see *S v Fazzie and Others* 1964 (4) SA 673 (AD) at 684 B - C] one that the "dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh" '.

(Per Trollip JA in *S v Pillay* 1997 (4) SA 531 (A) at 535 E - G.)

[14] There are strong indications that the misdirection in the present case by the court *a quo* was not material. The first is that the court *a quo* did not exclusively, or even substantially, rely on a comparison of the judgments premised on the minimum sentence provisions. The court properly took into account all the aggravating and mitigating circumstances that courts usually consider. It properly took into account the weight of the cocaine illegally

smuggled into our country by the appellant. On that basis alone the court *a quo* was entitled to impose a sentence of 12 years' imprisonment. As a very last remark the court *a quo* referred to *Homareda*. That remark was not the basis of the sentence imposed.

[15] From a careful reading and study of the judgment of the court *a quo*, I am also convinced that even if no reference had been made to *Homareda* or any other previous cases, the court would have imposed, or would have been correct to impose, a sentence of imprisonment for 12 years. In other words, the reference to the sentence imposed in *Homareda* was not only merely one of the factors taken into account; it was not even the first or conclusive one. I am unable to see how it can be said that the reference to *Homareda* is ' ... of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably' or that it ' ... vitiates the Court's decision sentence.' (See *S v Pillay* quoted above; see also *S v Kibido* 1998 (2) SA 213 (SCA) at 216 g to j.)

[16] The second indication that the misdirection was not material is that the court *a quo* was well aware that the minimum sentence provisions were not applicable in the present case. In referring to *Homareda*, and to the fact that in the present case the minimum sentence provisions were not applicable, the court *a quo* illustrated that it was aware of the different considerations applicable to *Homareda* and the present case.

[17] It is a salutary rule that this Court will not readily differ from a court *a quo* in its assessment either of the factors to be regarded to or of the value to be attached to them.

I also associate myself with what Kriegler J said in *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at 195 in para [13]:

> 'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and

> courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

Consequently, I am satisfied that although there was, technically speaking, a misdirection on the part of the court *a quo*, it did not constitute a material misdirection.

[18] The ultimate question is whether the sentence of 12 years' imprisonment imposed by the court *a quo* was a fair and reasonable one. (See *S v Peters* 1987 (3) SA 717 (A) at 727 F - H; *S v L* 1998 (1) SACR 463 (SCA) at 468 f to j.) I think it was.

[19] For a considerable time our courts have viewed dealing in 'hard' drugs, such as heroin and cocaine, in a very serious light. In *S v Gibson* 1974 (4) SA

478 (A) at 481 H this court, per Holmes JA, welcomed the effort of the Legislature

> ' ... to stamp out the growing social evils of the abuse of drugs as a wise and laudable one. No doubt, too, that, for example, a supplier for gain may in general be regarded as a vicious person who needs to be put down, for in the drug traffic he is an indispensable evil link in the chain leading to the consumer.'

[20] In *S v Hightower* 1992 (1) SACR 420 (W), a case concerned with dealing in cocaine, the Witwatersrand Local Division of the Supreme Court quoted with approval (per MacArthur J; Mahomed J concurring) what Schreiner JA had said in *R v Karg* 1961 (1) SA 231 (A) at 236 B - C, *viz*:

> ' It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'

MacArthur J, at 422 j, continued:

> 'The deterrent aspect, however, remains as important as ever. I have already mentioned this aspect briefly and I would add that anyone who wishes to deal in a dangerous dependence-producing drug like cocaine must be made to realise

> that the courts will not be sympathetic, but will exact a heavy price upon anyone who is found guilty of that offence.'

[21] There is ever-increasing smuggling of hard drugs into our country, described fully by Steyn AJ in *S v Randall* 1995 (1) SACR 559 (C) at 566 g - i. The learned judge continued (at 566 i - 567 a) with the following remarks, with which I fully associate myself:

> 'Drug dealers are unscrupulous criminals. They will use the weak, the gullible, and, may I add, the greedy. They are without conscience. They do not care for those who facilitate their evil objectives, nor do they have a concern about the lives they ruin by trafficking in drugs. Society is at risk should it hesitate to use every legitimate mechanism at its disposal to protect itself against their destructive designs. One of these weapons - and I emphasise that it is only one of them - is to make it clear to courier and principal alike, that the game is not worth the candle and that the price society exacts for transgressions will not be tempered by concern for the plight of the weak and the greedy.'

[22] The learned judge also emphasised (at 567 c - d) that in a multi-pronged strategy combating the importation and distribution of dangerous drugs,

> ' ... the courts have their role to play in imposing sentences which speak clearly of society's determination to fight this danger with all the weapons at its disposal.'

[23] It was also laid down by Steyn AJ (at 567 f- h) that the personal circumstances of couriers of hard drugs, mitigating though they may be, are outweighed by the public need for protection through the imposition of deterrent sentences. (See also *S v Sebata* 1994 (2) SACR 319 (C) at 322 j *et seq*.)

[24] In *Sebata*, *supra*, Steyn AJ referred with approval (at 323 g *et seq*) to the judgment of Lord Lane CJ and Talbot J in *R v Aramah* 1983 Crim LR (CCA) 271 where the learned judges remarked on the vice of dealing in hard drugs:

> ' ... first of all, they are easy to handle. Small parcels can be made up into huge numbers of doses. Secondly, the profits are so enormous that they attract the worst type of criminal. Many of such criminals may think, and indeed do think, that it is less dangerous and more profitable to traffic in heroin or morphine than it is to rob a bank. It does not require much imagination to realise the consequential evils of corruption and bribery which the huge profits are likely to produce. ..... this may be a fruitful source of violence and internecine strife. Fourthly, the heroin taker, once addicted (and it takes very little experimentation with the drug to produce addiction), has to obtain supplies of the drug to satisfy the terrible craving. It may take anything up to hundreds of pounds a week to buy enough heroin to satisfy the craving, depending upon the degree of addiction of the person involved. The only way, it is obvious, in which sums of this order can be obtained is by resorting to crime. This in its turn may be trafficking in the drug itself and disseminating accordingly its use still further.
>
> Fifthly, and last, and we have purposely left it for the last, because it is the most horrifying aspect, comes the degradation and suffering and frequently the

> death which the drug brings to the addict. It is not difficult to understand why in some parts of the world traffickers in heroin in any substantial quantity are sentenced to death and executed.
>
> Consequently anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving these class "A" drugs should be done.'

What the learned judges said of heroin and morphine, applies equally to cocaine (see *S v Sebata*, *supra*, at 325 1-b).

[25] 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. No wonder that in several countries and cultures, the smuggling of hard drugs is punishable by death. (For details, see D P van der Merwe, *Sentencing*, paragraph 12 - 5.)

[26] The aversion with which trafficking in hard drugs, especially the smuggling thereof into our country, is viewed by the courts, is illustrated by

repeated statements to this effect, and by the imposition of long terms of imprisonment, *eg S v Opperman* 1997 (1) SACR 285 (W) at 288 i *et seq*; *S v Homareda*, *supra*, at 326 and *S v Tshabalala*, 1999 (1) SACR 412 (C) at 427 a; *S v Howe* 1989 (2) SA 473 (W) at 478 E - G).

[27] In spite of all these statements and despite heavy sentences imposed by the courts the trafficking in drugs and the employment of couriers to smuggle hard drugs into our country has not abated or diminished. On the contrary, only the most naive would not be aware of the ever-increasing stream of drugs illegally coming into our country via international ports and airports. We are becoming known as a haven for dealers in drugs and our youth, students and schoolchildren are singled out as soft targets. Against this background, the legislature has over the years steadily increased the punishment to be meted out to dealers in drugs, including couriers from foreign countries. In 1971 the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 41 of 1971, was enacted. For illegal dealing in prohibited drugs, the discretion of the courts was taken

away: first offenders had to be given a minimum sentence of five years imprisonment; second and subsequent offenders had to be given a minimum of ten years.

[28] In 1986 the courts were given back their discretion in sentencing. (See the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act, 101 of 1986.) In 1990, however, by the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act 78 of 1990, the maximum sentences previously prescribed were raised substantially.

[29] All previous statutory provisions dealing with drug offences were repealed in 1992 by the Drugs and Drug Trafficking Act 140 of 1992. Section 17 prescribes maximum sentences. In the case of dealing in any dangerous dependence-producing substance or any undesirable dependence-producing substance, any court, including a magistrates' court, may impose a sentence of imprisonment for a period not exceeding 25 years, or both such imprisonment and such fine as the court may deem fit to impose (ss 5 (b), 17 (e) and 64).

[30] Finally, s 51 of the Criminal Law Amendment Act 105 of 1997 imposed minimum sentences for certain serious offences including *inter alia*, dealing in cocaine. The section provides that a regional court or High Court that has convicted a person of such offence may sentence the person, in the case of

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender, to imprisonment for a period not less than 25 years.

The maximum sentences imposed by the 1992 Act remain intact.

[31] In my view it is proper for a court considering sentence to have regard to the legislative policy as expressed in legislation dealing with sentencing. If this were not so, legal and social confusion would ensue, leading to a conflict between the legislator and the courts. In imposing sentences for drug-related crimes, courts must take cognisance of the persistent policy of the legislature that these crimes must be viewed in a most serious light and heavy sentences

imposed. (See also *S v Howe*, *supra*, at 478 E - G; *S v Gibson* 1974 (4) SA 478 (A) at 481 H per Holmes JA.)

[32] In short, this is not an area where 'maudlin sympathy' (the expression used by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 861 C - D) should be allowed to override common-sense and social and legislative policy. Nor should judges be swayed by misplaced pity (*intempestiva misericordia* - an expression used by Van der Linden *Supplement*, quoted by Joubert AJ in *S v Opperman* 1997 (1) SACR 285 (W) at 292; see also *S v Zinn* 1969 (2) SA 537 (A) at 541).

[33] The court *a quo* correctly found that the appellant had shown no remorse. He also did not testify under oath as to the alleged remorse. In *S v Seegers* 1970 (2) SA 506 (A) at 511 G - H, Rumpff JA made a remark which has been followed in numerous cases and is part of daily practice in the criminal courts:

> 'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

[34] I am also not impressed by the argument that it will be hard for the appellant to be incarcerated for a long period in a foreign country. That will happen because the appellant chose our country for the commission of a vile crime. In *S v Lister* 1993 (2) SACR 228 (A) this Court, per Nienaber JA said at 232 g - h:

> 'To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.'

[35] Even if one accepts the alleged personal circumstances of the appellant - he chose not to confirm them under oath - they are not out of the ordinary and certainly do not deserve special, more lenient treatment.

[36] This Court must also be sensitive to the message it sends out to the legislator, the public and drug dealers here and overseas. Our country is fast becoming known as a profitable and easily accessible market for drug dealers and drug smugglers. Because of the relatively light sentences our courts impose for

these offences, compared to many other countries and because of the particularly lenient parole conditions prevailing here at present, illegal drug trafficking has obviously become a profitable business. The appellant was prepared to take the risk of a confrontation with our criminal justice system in return for a remuneration of U$ 5 000. The sentences imposed by the courts must make it clear to intended drug couriers that the game is not worth the candle.

[37] Because the appellant chose not to testify under oath, one does not know whether he intended to sell the cocaine himself or to deliver it to a pre-arranged dealer here. He did not take the court into his confidence, so that the recipient, if there were one, could be identified and brought to justice. In my view this constitutes an aggravating circumstance. (See *S v Sebata*, *supra*, at 325 3e - g; *S v Opperman*, *supra; R v Aramah*, *supra*; S *v Randall*, *supra*, at 566 e - g; *S v Smith en Andere* 1978 (3) SA 749 (A) at 758 F - G.)

[38] Finally, in my view, if one has regard to appropriate sentences imposed by our courts (*ie* where the minimum sentence provisions are not applicable) a

sentence of 12 years' imprisonment is not improper or unreasonable, and by no means disturbingly inappropriate. One may compare the judgment of this Court in *S v Morebudi* 1999 (2) SACR 664 (SCA). In that case, the appellant and a co-accused were convicted in the regional court, Pretoria, of dealing in 1 433 kg of dagga in contravention s 5 (b) of the 1992 Act - the same provisions under which the present appellant was prosecuted. The appellant in that case was sentenced to 14 years' imprisonment and the co-accused to 7 years. The appellant's vehicle, used in conveying the dagga, and valued at R 63 000,00, was forfeited to the State. The magistrate took into account a previous conviction of the appellant, 20 years earlier. It had lapsed, but this Court held that it could be taken into account for the limited purpose of showing that the crime had been committed in spite of a previous warning. This does not distinguish *Morebudi* from the appeal now under consideration, because it is clear that the present appellant knew that he was acting illegally and was aware of the seriousness of the offence in this country.

Also in *Morebudi* the magistrate had found that the appellant was a 'Mafia-type organiser of a large network of dealers'. In the present case the appellant cannot be said to be the organiser of a large network of dealers, but clearly he was a willing participant in smuggling cocaine. In this regard this Court in *Morebudi* held that whether the appellant was a one-man dealer or formed part of an 'omvangryke smokkelaarsnetwerk' made little difference, regard being had to the quantity of dagga involved. In the present case the crime was undoubtedly at least as serious and suggestive of previous planning and execution as that under consideration in *Morebudi*.

[39] In *Morebudi,* the accused was 35 years old, and the father of two children. The sentence of 14 years' imprisonment and the forfeiture of the vehicle was confirmed by this Court.

[40] Counsel for the appellant in the present case contended for a sentence of imprisonment for eight to ten years. Such a sentence would, in my view, be

unrealistically lenient and contrary to present policy and public interest. It would be totally inadequate and disturbingly inappropriate.

[41] In the result, the sentence of 12 years' imprisonment imposed by the court *a quo* is confirmed and the appeal is dismissed.

P J J OLIVIER JA