IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO CA&R 74/2019

Reportable	**Yes /No**

In the matter between:

GIOVAN KIEWITS **Appellant**

And

THE STATE **Respondent**

JUDGMENT

RUSA AJ:

[1] The appellant was convicted in the Magistrate's Court, Grahamstown for contravening section 4(b) read with sections 1, 13(d), 17(d), 18, 19, 25, 64 and Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 (the Act), being in unlawful possession of an undesirable dependence producing substance, namely two packets of tik with a street value of R120. The tik amounted to 56 grams and contained Methamphetamine. After pleading guilty to the charge, the appellant was convicted and sentenced to a period of 3 years' imprisonment.

[2] The appellant appeals against the sentence, with the leave of the court *a quo*.

[3] The appellant has two previous convictions for contravention of section 4 of the Act. The first was committed on 15 May 2016 and the appellant was convicted and sentenced to R200 or 40 days' imprisonment, which was wholly suspended for 3 years on condition that he was not convicted for possession of drugs during the period of suspension. The second offence was similar to the first and was committed on 14 March 2017. Upon conviction, the appellant was given a sentence of R2000 or 6 (six) months imprisonment, half of which was suspended for 5 (five) years on condition that he was not convicted of contravening section 4(b) of the Act during the period of suspension.

[4] A pre-sentence report dated 20 July 2018 (the report) was handed in, wherein the probation officer (the officer) recommended that the court *a quo* impose a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 (the CPA). Following the filing of the report, the State requested the officer to supplement the report to deal with the interests of society as the report focused on the personal circumstances of the appellant. The report was supplemented after the officer had interviewed one Ms Duffy who was Chairperson of the Community Police Forum for Grahamstown. During the interview, Ms Duffy told the officer that the drug use and stealing in the area in which the appellant resided was dominant and that affected the area and various schools such as St Marys Primary School, and others mentioned in the supplementary report. It was also reported that the learners at those schools were using drugs.

[5] In her judgment, the learned magistrate stated that she had considered the appellant's previous convictions and sentences imposed and further remarked that the

date of the offence for which the appellant was charged was within a few months of the last conviction. The magistrate held a view that the attitude or demeanour of the accused demonstrated that he learnt nothing from his previous convictions and that the fact that he was under suspension showed that he did not take the charges seriously. The only suitable sentence in the circumstances would be that of direct imprisonment. Accordingly, the appellant was sentenced to a period of 3 (three) years' imprisonment for the offence for which he was convicted.

[6] It is trite that sentencing is within the discretion of the trial Court.

[7] In *S v De Jager & Another*[1], Holmes JA held as follows:

> ". . . It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is limited."

[8] In *S v Malgas*[2], Marais JA had this to say:

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[1] *S v De Jager & Another* 1965 (2) SA 616 (A) at 628H-629.
[2] *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12.

> "A court exercising appellate jurisdiction cannot, in the absence of material discretion 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial Court has no relevance. As it is said, an appellate Court is at large. *However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of 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'*" (Own emphasis).

[9] During argument, it was conceded by counsel for the appellant that, in light of the appellant's previous convictions, there was no material misdirection on the part of the learned magistrate. Despite that concession, the appellant argued that the sentence imposed by the learned magistrate was still shockingly inappropriate.

[10] The appellant is 26 years of age and has two children. He has been employed since 2016 and is earning the sum of R4000 per month. The appellant supports his family with his salary. The appellant is a repeat offender and clearly has a drug abuse problem. Whilst he was out on bail and awaiting trial, he admitted himself to the hospital to undergo treatment of that problem. Following his rehabilitation, the Clinical Psychologist remarked that the appellant undergo individual therapy session. There is

no reason why such an intervention, if accepted by the appellant, cannot be done whilst he is in custody. To that end, the learned magistrate was correct in imposing a custodial sentence. However, the only issue I have is that pertaining to the period of sentence which the learned Magistrate imposed.

[11] There is no doubt that there is prevalence of drug abuse in society. This was also confirmed by Ms Duffy during her interview with the officer concerning the area in which the appellant lives. However, that does not justify a prolonged imprisonment such as that imposed by the learned magistrate.

[12] In *S v Rabie*[3], Corbett JA held that "a judicial officer should not strive after severity, nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality".

[13] In light of the appellants' circumstances, the offence he committed and the interest of the society, I would have imposed a sentence of eighteen months on the appellant. It follows that the sentence imposed by the learned magistrate is twice the sentence I would have imposed. In my view, this constitutes a sufficiently marked disparity to justify interference on appeal.

[14] In the result, the appeal succeeds. The order of the court *a quo* is set aside and replaced with the following:

"The appellant is sentenced to eighteen (18) months' imprisonment for contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992."

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[3] *S v Rabie* 1975 (4) SA 855 (A) at 866A-C.

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M RUSA

ACTING JUDGE OF THE HIGH COURT

I agree.

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J EKSTEEN

JUDGE OF THE HIGH COURT

Counsel for the Appellant:	Mr H Charles
Instructed by:	Grahamstown Justice Centre
	GRAHAMSTOWN
For the Respondent:	Adv. L W Sinclair
Instructed by:	Director of Public Prosecutions
	GRAHAMSTOWN
Date Heard:	14 August 2019
Judgment Delivered:	16 August 2019