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Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: CA & R 19/2025

In the matter between:

XOLANI MAY

Appellant

and

THE STATE

Respondent

Neutral citation: *May v The State* (CA & R 19/2025) (19 September 2025)

Coram: PHATSHOANE DJP and MAMOSEBO J

Heard: 21/07/2025.

Delivered: 19/09/2025.

Summary: Criminal Law – Appeal against sentence of five years’ imprisonment for contravention of s 4(b) of the Drugs and Drug Trafficking Act, 140 of 1992 – Whether the trial court over-emphasized the seriousness of the offence and the interests of society – Under-emphasized the personal circumstances of the appellant – Whether all sentencing options other than direct imprisonment were considered – Whether the sentence is shockingly harsh or inappropriate.

ORDER

On appeal from: the Magistrates' Court for the District of ZF Mgcawu, Upington (Magistrate Maje, sitting as a trial court):

1. The appeal against the sentence is upheld.
2. The sentence imposed by the trial court on 26 September 2024 is set aside, and replaced with the following:

‘The accused is sentenced to two years’ imprisonment, of which one year is suspended for three years on condition that the accused is not found guilty of contravening s 4(a) or 4(b) of Act 140 of 1992 during the period of suspension.’

3. The sentence is antedated to 26 September 2024.

JUDGMENT

Mamosebo J (Phatshoane DJP concurring)

- [1] At the heart of this appeal is the question whether the Magistrate, following the conviction of the appellant in the Magistrates' Court for the district of ZF Mgcawu, Upington, erred in imposing a five-year imprisonment on him. The appellant had pleaded guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) to possession or use of 5 Mandrax tablets and 13 quarter Mandrax tablets containing methaqualone in contravention of s 4(b) of the Drugs and Drug

Trafficking Act 140 of 1992. With leave of this Court, he is before us on appeal against his sentence only.

- [2] The grounds upon which the appellant relied for this appeal were that the trial court erred in over-emphasizing the seriousness of the offence and the interests of society; under-emphasizing the personal circumstances of the appellant; not considering the other sentencing options other than direct imprisonment; and imposing a sentence that is shockingly harsh and inappropriate.
- [3] What can be distilled from the appellant's plea explanation is the following. He made the statement freely and voluntarily without undue influence whilst in his sound and sober senses. He pleads guilty to possession of drugs. On 13 May 2024, he was at his place of residence in Uppington when he was accosted by the police. They enquired whether drugs are being sold at his residence. He denied selling drugs but admitted to smoking them. He gave them permission to search the house. They found the drugs described in paragraph 1 above. He admits the correctness of the affidavit compiled by W/O Rixile Adelaide Mthombeni in terms of s 212 of the CPA that determined that the exhibit contained methaqualone. He knew that his actions were unlawful and punishable by law. The State accepted the appellant's plea to possession of drugs and the Magistrate convicted him as charged. The State did not prove any previous convictions.
- [4] The following were the personal and mitigating circumstances. The appellant is a first offender. He was 34 years old on conviction. He was cohabiting with his girlfriend. He has two children aged 14 and 7 years. He has a chronic health condition and is unemployed. He is supported by his family and girlfriend. His highest level of education is Grade 12. He

was awaiting trial for three days whilst in detention. It was contended for him that he is a suitable candidate for rehabilitation. It was further submitted that he has stopped using drugs since his incarceration. He has pleaded guilty and did not waste the court's time. The defence requested a wholly suspended sentence, as being appropriate in the circumstances.

- [5] In aggravation of sentence, the prosecutor submitted that the offence was prevalent in the court's area of jurisdiction; that the drugs that the accused had been found to have possessed contained methaqualone, which is highly addictive. This drug dependence leads to domestic violence, which is destroying the future of the community; housebreaking; and increased robbery statistics. However, there was no evidence before the trial court to support these submissions. The State supported the defence that a suspended sentence would be suitable.

- [6] The trial court regarded the offence as very serious and remarked:

'The accused is convicted of a very serious offence when one looks at the charge sheet there is a question that comes to the court's mind why he was not charged for dealing in drugs? Because a person who is unemployed cannot be found in possession of 5 full Mandrax tablets and 13 quarters. Mandrax is not like water or food parcel or something that government can give you for free. They are expensive and you cannot afford so many of them if you are not working.

...

These days you can struggle to get cold water but not drugs. So enough is enough with drugs...with drug possession and drug dealers in our communities and from today moving forward the Court will start sending a message that says enough is enough.'

These sentiments by the trial court are not borne out by the evidence and regrettably reflect the trial court's lack of an individualised approach to sentencing.¹

- [7] In sentencing the accused to five years' direct imprisonment, the trial court limited itself to only two sentencing options and remarked that it could not impose a fine because the appellant was unemployed. It further remarked that it would not be appropriate to consider cautioning and discharging the appellant, as that sentence would send a wrong message to the community.
- [8] Mr Jacobs, for the State, conceded that the trial court has failed to exercise its discretion judicially when sentencing the appellant and that the sentence is shockingly inappropriate and must be set aside and substituted with a sentence this court deems just.
- [9] It is necessary to reiterate the trite sentencing principle that punishment is pre-eminently a matter for the trial court's discretion.² The circumstances in which a court of appeal may interfere in the sentencing discretion of a lower court are circumscribed. The principles were restated in *S v Malgas*³ in the following terms:

'The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. 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

¹ See *Makgobo v S* (A121/2023) [2023] ZAWCHC 238 (8 September 2023) para 9.; see also *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA), 2022 (2) SACR 1 (SCA) para 53.

² *S v Rabie* [1975] 4 All SA 723 (A), 1975 (4) SA 855 (A) at 857D-E.

³ 2001 (1) SACR 469 (SCA), 2001 (2) SA 1222 (SCA), [2001] 3 All SA 220 (A) para 12.

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”. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.’

- [10] It is also trite that each case has to be decided on its own facts, and sentences imposed in similar cases do not bind the sentencer’s discretion but rather provides guidelines for sentencing. The Appellate Division in *S v Sinden*⁴ explained:

‘Decided cases dealing with sentence may be of value also as providing guidelines for the trial court’s exercise of discretion (see *S v S* 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See *R v Karg* 1961 (1) SA 231 (A) at 236G). But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. “(E)ach case should be dealt with on its own facts, connected with the crime and the criminal ...”

⁴ 1995 (2) SACR 704 (A) at 708A – B.

- [11] Similarly, in *S v D*⁵, it was aptly stated that ‘decided cases on sentence provide guidelines, not straitjackets’. Further, in *S v PB*⁶ the Supreme Court of Appeal cautioned against a slavish following of decided cases on sentences, which could result in an abdication by the court of ‘its duty and discretion to consider sentence untrammelled by sentences imposed by another court, albeit in a similar case’.⁷ On the other hand, it is equally important that sentences imposed in similar cases must be seen to be consistent.⁸ And it is indeed also for this reason that value can be gained by considering sentences imposed in comparable cases.⁹ Regard being had to these principles, I now turn to consider a few cases.
- [12] In *S v Collins*¹⁰, the 37-year-old appellant was convicted of dealing in one Mandrax tablet in contravention of s 2(a) of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971. He was sentenced to four years’ imprisonment of which two years were conditionally suspended for five years. On appeal, the sentence was altered to two years’ imprisonment wholly suspended for five years on appropriate conditions.
- [13] The accused in *S v Harding*¹¹ was convicted on three counts of contravening s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, in that he had sold 112 tablets of lysergic acid diethylamide (LSD) through police traps on three separate occasions. On appeal, the convictions were confirmed, but the sentence of eight years imprisonment

⁵ 1995 (1) SACR 259 (A) at 260E.

⁶ 2013 (2) SACR 533 (SCA) para 16.

⁷ See also *Director of Public Prosecutions, Free State v Mokati*, *Ibid* fn 1, para 87.

⁸ See *S v McMillan* 2003 (1) SACR 27 (SCA) para 10.

⁹ *S v Tiry and Others* 2021 (1) SACR 349 (SCA) para 120.

¹⁰ 1990 (1) SACR 577 (A).

¹¹ 1996 (1) SACR 503 (C).

was set aside and substituted with a sentence of three years of correctional supervision in terms of s 276(1)(h) of the CPA.

- [14] The accused who was 42 years old and a first offender was convicted in the Magistrates' Court of possession of six Mandrax tablets in *S v Markus*¹². Because he had already spent five months in prison awaiting trial, and earned R350 per week with four minor children to support, the appeal court found the sentence of R2000 or 18 months' imprisonment to be harsh. The appeal court set aside the sentence and substituted it with a fine of R500 or four months' imprisonment.
- [15] The Appellate Division in *S v Masike*¹³ set aside the sentence of eight years' imprisonment which was conditionally suspended for the sale of 250 Mandrax tablets. The court found that the 53-year-old appellant committed a serious offence and had criminal propensity, but played a minor role in the sale of the tablets. The sentence was substituted with four years' imprisonment, of which two years were suspended for five years on specified conditions.
- [16] In *casu*, the number and form in which the tablets were found at the appellant's residence raises a cause for concern. However, a court must adjudicate the matter on the objective facts placed before it and exclude speculative hypotheses, contrary to what the Magistrate has done. Regard being had to the above considerations and authorities; submissions made from the point of view of deterrence, retribution, prevention and rehabilitation; as well as the appellant's plea of guilty and personal mitigating circumstances, the imposition of a lesser sentence is justified. In any event, the sentence imposed is out of kilter with those imposed in comparable cases as well as the sentence this Court would impose under

¹² 1997 (2) SACR 538 (C).

¹³ 1992 (1) SACR 667 (A).

the circumstances. Accordingly, this Court is entitled to interfere and alter the sentence. The sentence of five years' direct imprisonment was not warranted. The appellant was sentenced on 26 September 2024 and has served almost ten months of his sentence.

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

1. The appeal against the sentence is upheld.
2. The sentence imposed by the trial court on 26 September 2024 is set aside, and replaced with the following:

'The accused is sentenced to two years' imprisonment, of which one year is suspended for three years on condition that the accused is not found guilty of contravening s 4(a) or 4(b) of Act 140 of 1992 during the period of suspension.'

3. The sentence is antedated to 26 September 2024.



MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the appellant: Mr H. Steynberg
Instructed by: Legal Aid South Africa (Kimberley)

For the respondent: Adv. R.E. Jacobs
Instructed by: Office of the Director of Public Prosecutions