



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: CA & R181/2021

In the matter between:

NOLAN WELLINGTON

Appellant

and

THE STATE

Respondent

JUDGMENT

APPELS AJ:

Introduction

[1] The appellant was convicted in the Magistrates' Court in Kariega on a charge of contravening section 5(b) read with sections 1, 13(f), 17(e) of the Drugs and Drug Trafficking Act, 140 of 1992 ("the Act").¹ He was sentenced to eight years' imprisonment, four years of which were suspended for five years on condition that he is not convicted of contravening section 5 of the Act within the period of suspension.

¹ Section 5(b) of the Act provides that: "No person shall **deal** in—...(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,...". Section 13(f) provides that contravention of section 5(b) is a criminal offence.

[2] This is an appeal against his conviction and sentence. He was granted leave to appeal by the Magistrates' Court on 26 April 2021.

Non-compliance with Section 105 of the Criminal Procedure Act 51 of 1977

[3] In terms of section 105 of the Criminal Procedure Act 51 of 1977 ("the CPA"), the prosecutor must put the charge to the accused before the commencement of the trial and the court must require the accused to plead to the charge in accordance with section 106. The provisions of section 105 are peremptory.²

[4] In preparation for the hearing of the appeal, it became apparent that the prosecutor did not put the charge to the appellant prior to the commencement of the trial. Instead, the prosecutor addressed the trial court at the commencement of the trial and stated that: *"The defence had access into the docket . . . as well as the charge sheet, and is aware of the charge against the accused."*

[5] The magistrate did not require the appellant to plead to the charge. Instead, the appellant's attorney, Mr Malgas, confirmed the correctness of the statement by the prosecutor and informed the magistrate that the appellant *"pleads not guilty and is ready to proceed with the trial"*.

[6] During the appeal, and in response to questions from the bench in relation to the above, counsel for the respondent, Ms Obermeyer, informed the court that this particular type of irregularity is not unusual and occurs frequently in the lower courts. At the conclusion of the appeal hearing, the parties were requested by the court to file supplementary heads of argument dealing specifically with the issue of non-compliance with section 105 within two weeks of the date of hearing, this aspect having not been raised by the appellant in the appeal. Both parties filed supplementary heads of argument within the period stipulated by the court.

[7] In his supplementary heads of argument, the appellant's attorney, Mr Sojada, submitted that the failure to comply with section 105 rendered the trial unfair and that the conviction and sentence ought to be set aside. In this regard, he

² *S v Mamase and Others* 2010 (1) SACR 121 (SCA) at para 7.

referred to the case of *S v ZW*³ where the court held that non-compliance with section 105 is an irregularity. In *S v ZW*⁴ the court held that the party who is seized with the duty to put the charge to the accused is the state prosecutor, by virtue of him being the official representative of the State. The task of informing the accused of the charge should not be left to the accused's legal representative.

[8] It should however be noted that although the court in *S v ZW*⁵ deemed the failure of the prosecutor to comply with section 105 an irregularity and held that the failure by the magistrate to intervene and cure the irregularity was a misdirection, the court nevertheless did not hold that the irregularity and misdirection vitiated the entire proceedings. This is evidenced by the fact that the conviction of the appellant was not set aside. The court set aside the sentence of life imprisonment because (*inter alia*) the legislative provisions relating to prescribed minimum sentences were not explained to the accused.⁶

[9] Mr Sojada, in the appellant's supplementary heads of argument, also placed reliance on *S v Mashaba*,⁷ for the proposition that where a criminal trial does not commence with the charge being put to the accused and affording him an opportunity to plead thereto, "*everything that follows is not a trial in terms of the law of the country.*"⁸ It must be said that the facts of the present matter are distinguishable from those in *Mashaba*, in that in those proceedings the plea process envisaged in section 105 was entirely absent, the Magistrate having simply convicted an unrepresented accused for contravening section 31(1) of the Maintenance Act, 99 of 1998, following a request from the prosecutor to postpone the matter (by agreement between the parties) to afford the accused an opportunity of making payment of arrear maintenance in the admitted sum of R6 000. The court, in *Mashaba*, relying on *S v Gumbi and others*⁹ and *S v Mamase and others*¹⁰ found the proceedings to be irregular and set them aside.

³ *S v ZW* 2015 (2) SACR 483 (ECG) at p41(e).

⁴ *S v ZW*, *supra* at p41(c).

⁵ *S v ZW*, *supra* at p41(e).

⁶ *S v ZW*, *supra* at p41(f).

⁷ [2022] ZAMPMBHC 88 (8 December 2022).

⁸ *S v Mashabe* at para 12.

⁹ 2018 (2) SACR 676 (SCA).

[10] Binns-Ward J, in analysing *Mamase*, stated as follows in *S v Moses*:¹¹

“Para 7 of the judgment of the Supreme Court of Appeal in S v Mamase and Others 2010 (1) SACR 121 (SCA), to which reference was made in ZW in the passage quoted earlier, does not hold that s 105 is peremptory in the sense that it is essential that it be complied with to the letter. The judgment holds that a plea process in criminal proceedings is peremptory in terms of s 105, which is something different. The appeal court made that observation in the context of determining when a trial commences. Its determination was that the effect of s 105 (and s 106, which prescribes the nature of the various types of plea that an accused may plead) is that a criminal trial does not commence until the accused pleads to the charge(s). To use an analogy from civil procedure, litis contestatio is not obtained, and the case is not triable, until the accused has pleaded.”

[11] It is accordingly clear that the appellant’s reliance on *Mashaba* is, in the present circumstances, misplaced.

[12] In the respondent’s supplementary heads of argument, Ms Obermeyer, submitted that, on the facts of this matter, the non-compliance with section 105 did not render the trial unfair. In this regard, she referred to *Moses*¹² where the court, relying on *ZW*, *Motlhapeng v S*,¹³ and *S v Porrit*,¹⁴ held that the application of section 105 should be approached pragmatically rather than formalistically.

[13] When it comes to the interpretation of statutory provisions, our courts have emphasised that the focus is less on whether a provision has been couched in peremptory terms, and more on whether the substantive purpose of the provision has been achieved.¹⁵

[14] In this regard, it should be noted that the purpose of section 105 is to give effect to an accused’s right as enshrined in section 35(3)(a) of the Constitution, to be

¹⁰ 2010 (1) SACR 121 (SCA).

¹¹ *S v Moses* 2019 (1) SACR 75 (WCC).

¹² At para 19.

¹³ [2015] ZANWHC 60 (17 September 2015).

¹⁴ 2016 (2) SACR 700 (GJ).

¹⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Security Agency and Others* 2014 (1) SA 604 (CC) at para 30.

informed of the charge with sufficient detail to answer to it. Therefore, where there is non-compliance with the peremptory provisions of section 105, the appeal court should consider whether the non-compliance has materially compromised the appellant's rights to a fair trial. An accused's right to a fair trial would be materially compromised if the purpose of section 105 was not achieved, i.e. if he was not informed of the charge with sufficient detail to answer to it.

[15] Having said that, the provisions of section 105 of the CPA should ordinarily be complied with according to its tenor, and it is lamentable that the magistrate did not insist that the charge be put to the appellant. However, in the circumstances of this matter, (i) the appellant was legally represented; (ii) his attorney, in the appellant's presence in open court, confirmed to the court that the appellant had insight into the charge sheet, was aware of the charge against him, and pleaded not guilty thereto; and (iii) it is clear from the record that the appellant was familiar with the charge sheet.

[16] I am of the view that in the present circumstances, the appellant was informed in sufficient detail of the charge to enable him to plead thereto, which he effectively did, through his legal representative. The object and purpose of section 105 was therefore substantially fulfilled, there being no prejudice to the appellant's right to a fair trial.

The Evidence for the State

[17] The appellant was arrested on 13 May 2017 by Sergeant Sonwabile Majuba ("Majuba") near the corner of Verwoerd and Cawood Streets in Kariega on suspicion that he was dealing in an undesirable dependence-producing substance, methamphetamine,¹⁶ known by its street name, "tik". At the trial, the state led the evidence of two witnesses, Majuba and Constable Ndabeni ("Ndabeni").

[18] Majuba testified that he was on duty performing crime prevention duties with Ndabeni on 13 May 2017. They were patrolling an area in Kariega in a marked police

¹⁶ Methamphetamine is listed in Part III of Schedule 2 of the Act. Section 1 of the Act defines "undesirable dependence-producing substance" as "any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2."

vehicle when they saw a man, later identified as Dillon Mitchell (“Mitchell”), standing near the corner of Cawood and Verwoerd Streets, Kariega. When their vehicle moved in his direction, Mitchell suddenly took off and started running.

[19] Majuba testified that he exited the police vehicle and started chasing Mitchell. As he closed in on him, Mitchell ran down a gravel road towards a motor vehicle which was positioned diagonally across the road, approximately 200 meters from where the chase started. Mitchell entered the vehicle and sat in the front passenger seat. Upon his entry, the appellant, who occupied the driver's seat, switched on the ignition.

[20] Majuba approached the men and instructed them to exist and secure their hands on the vehicle. He waited for Ndabeni to join him before he started searching Mitchell. When he searched Mitchell, he found a small packet of tik inside his pocket and arrested him for possession of drugs. Majuba commenced searching the appellant and found a “money bag”, containing approximately 30 small plastic packets of tik, in his back trouser pocket, as well as R212 on his person. He called for back-up and in addition to Ndabeni, several other police officers arrived on the scene.

[21] He thereafter searched the vehicle and found a small scale and a small spectacle case. Inside the spectacle case, he found a spoon and small plastic packets of tik, that looked similar to those found on the appellant. Majuba arrested the appellant on suspicion of dealing in drugs. He testified that the scale and spoon found in the vehicle are tools commonly used by drug dealers to weigh drugs and to scoop drugs into plastic bags (“the equipment”).

[22] The plastic packets were sealed into an evidence bag and tested at the Eastern Cape Forensic Laboratory. According to an affidavit deposed to by Warrant Officer Mabizela (“Mabizela”) in terms of section 212 of the CPA, the material inside the plastic packets was tested and confirmed to be methamphetamine. The affidavit of Mabizela was admitted into evidence with no objection by the appellant, marked Exhibit B.

[23] The second witness who was called by the State was Ndabeni. During his examination in chief, he corroborated Majuba in all material respects. However,

during cross-examination, it became evident that he was not paying close attention to the search conducted by Majuba when he searched the vehicle. He was uncertain exactly where in the vehicle Majuba found the equipment and other bags of tik and was also uncertain of the exact quantity of the bags found by Majuba. He eventually conceded during cross-examination that he did not watch Majuba closely when he searched the vehicle because he was watching the two suspects.

The Appellant's Version

[24] The appellant denied that Mitchell entered the vehicle and sat in the front passenger seat. In fact, he denied knowing Mitchell at all. His version is that on the night in question, he was driving a vehicle, which belonged to a family member, in an area unknown to him. Having taken a wrong turn on a gravel road, he proceeded to make a U-turn. In the process thereof, he saw Majuba chasing Mitchell. Mitchell ran approximately 30 meters past the vehicle when Majuba caught up with him and dragged Mitchell back to the vehicle, assaulted him, made him put his hands on the vehicle and searched him. According to the appellant, he remained seated in the vehicle until Ndabeni arrived. More police officers in police vehicles arrived on the scene. Amongst them was Constable Bacor ("Bacor").

[25] The appellant was instructed to exit the vehicle and he was searched. Cash in the amount of just under R800, was found on him. Majuba searched the vehicle, ripped out the sound boxes, searched inside the vehicle under the car seats, the dashboard, and inside the cubby hole but found no drugs. It was only once Majuba searched under the vehicle at the rear-end on the driver's side that he found the drugs and equipment on the ground underneath the vehicle. Notably, on a reading of the appellant's evidence, he at no stage informed Majuba that Mitchell was a stranger to him and entirely unaffiliated with him. I return to this aspect later.

[26] Bacor was called to testify on behalf of the appellant. He was amongst the policemen who were called as back-up. According to him, the appellant was still seated in the vehicle when he arrived. He did not witness Majuba conducting a search of the vehicle. Instead, he saw Majuba searching around and underneath the vehicle while the appellant remained seated inside. He saw Majuba pulling out a transparent plastic bag with a number of smaller plastic bags inside, filled with a

substance which he was told was tik, from underneath the right rear wheel of the vehicle. After they pulled out the bag from under the vehicle, they arrested the appellant and searched him. Majuba then informed him that they would take the vehicle to the police station where the vehicle would be searched.

The Magistrate's Judgment

[27] It is evident from the magistrate's judgment that he found Majuba to be a credible witness. He stated the following in his judgment regarding Majuba's evidence:

"After thorough cross examination the evidence of Majuba stood firm. He was an interesting witness who made a good impression on the court. There could be little criticism of his evidence..."

[28] Although the magistrate also found Ndabeni to be a credible witness, he criticised certain aspects of his evidence and acknowledged that he did not fare as well as Majuba under cross-examination. He however noted that Ndabeni, subject to what I have stated above relevant to Ndabeni not having observed the search, corroborated Majuba in all material respects. In his analysis of Ndabeni's evidence he stated the following:

"He confirmed Mr. Majuba's evidence on material aspects on point, although genuine criticism can be brought into his testimony, it cannot be said that he was not truthful..."

[29] Both Majuba and Ndabeni were therefore found to be credible witnesses by the magistrate and he accepted their evidence.

[30] The magistrate did not find the appellant to be a credible witness and was especially critical of the fact that there were material differences in the appellant's version that was put to Majuba, compared to the version he presented during his own oral evidence. The magistrate was also critical of Bacor and noted that his evidence and that of the appellant differed in material respects from each other. He therefore rejected the evidence of the appellant and Bacor insofar as it was inconsistent with the accepted evidence of Majuba and Ndabeni.

Grounds of appeal

[31] The grounds of appeal against the conviction as formulated in the notice of appeal are the following:

(a) In the judgment, the trial court levelled criticism against Majuba and therefore the evidence of Ndabeni is uncorroborated in respect of material issues in the case.

(b) The court erred in not finding that there were material corroboratory aspects between the evidence of Bacor and the appellant.

(c) The court erred in finding that the state had proven the offence of dealing in drugs.

[32] In respect of the sentence, the grounds of appeal are that:

(a) The court erred in finding that direct and long-term imprisonment should be imposed.

(b) Since no direct evidence of dealing in drugs was placed before the court, direct imprisonment should not have been imposed.

Analysis

Assessment of the Evidence for the State

[33] The State bears the onus to prove the guilt of an accused beyond reasonable doubt. It is also trite that if an accused's version is reasonably possibly true, he is entitled to an acquittal. It is not necessary for the State to eliminate every inference which is inconsistent with the appellant's guilt or which is consistent with his innocence. In this regard, in *S v Sauls and Others*¹⁷ the court held as follows:

"The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called on to seek speculative explanations for the conduct which on the face of it, is incriminating."

¹⁷ *S v Sauls and Others* 1981 (3) SA 172 (A) at p182G-H.

[34] When faced with two mutually destructive versions, a trial court must consider the credibility and reliability of the witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities to ultimately determine whether the State has satisfied the requirement of proof beyond a reasonable doubt.¹⁸

[35] In this matter it is common cause that the police found tik and the equipment on the scene near the appellant. There is however a factual dispute as to where the drugs and equipment were found. The State's witnesses stated that the tik was found in the appellant's pocket and that more tik and the equipment were found inside the vehicle driven by the appellant. The appellant admits that the police found the tik and equipment on the scene but stated that it was found on the ground underneath the vehicle. Following an analysis of the evidence in line with the principles set out in *S v Singh*,¹⁹ *S v Janse van Rensburg and another*,²⁰ and *Viveiros v S*,²¹ the magistrate correctly assessed Majuba and Ndabeni as acceptable witnesses, and rejected the evidence of the appellant and Bacor (insofar as it contradicted the accepted evidence) as wholly improbable and not reasonably possibly true, being alive not only to the contradictions between their respective evidence, but also the inherent contradictions and inconsistencies in their evidence, individually. Whilst not explicitly stated, it is clear from the magistrate's reasoning that he found Majuba's evidence (and that of Ndabeni, subject to what I have stated above), viewed holistically against the body of the evidence, to be probable and such as to be accepted. No criticism can be levelled against the Magistrate's consideration of the aforesaid, and ultimately, the conclusion which he reached.

[36] Generally, a court of appeal will very rarely interfere with the findings of fact of the trial court, including credibility findings about witnesses.²² The following was

¹⁸ *Doorewaard and Another v The State* 2021 (1) SACR 235 (SCA) at para 22.

¹⁹ 1975 (1) SA 227 (N) at 228 E-H.

²⁰ 2009 (2) SACR 216 (C) at para 8.

²¹ [2000] 2 ALL SA 86 (A) at para 3.

²² *R v Dhlumayo and another* 1948 (2) SA 677 (A) at p705-706.

stated in *R v Dhlumayo*²³ regarding the approach an appeal court should have to credibility findings by the trial court:

“The trial Judge has advantages – which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

Consequently, the appellate court is very reluctant to upset the findings of the trial Judge.”

[37] Furthermore, where the issues turn on findings of fact by the trial court, the following dictum in *State v Hadebe and Others*²⁴ is instructive:

“Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against the finding of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong”.

[38] In this matter, and as intimated above, I am of the view that the magistrate’s credibility findings, and findings of fact, were justified, there being no basis to interfere therewith. In this regard, it appears from the record that Majuba’s evidence was unassailable and that he held firm under cross-examination. No genuine criticism was levelled against Majuba’s evidence by the magistrate, and none was warranted.

[39] I agree with the magistrate that Ndabeni’s evidence was not as strong as Majuba in certain respects. More particularly, Ndabeni, who had appeared uncertain in his evidence in chief in relation to the facts surrounding the search, conceded during cross-examination that he did not pay close attention to Majuba’s search of the vehicle, in that he was keeping watch over the two suspects. Accordingly, he had no first-hand knowledge of where Majuba found the tik and the equipment, same having been shown to him by Majuba, following the search. For this reason,

²³ *R v Dhlumayo & another*, *supra* at p705.

²⁴ *S v Hadebe and Others* 1997 (2) SACR 642 (SCA) p645E-F.

Ndabeni was of the view that Majuba was best placed to answer questions in relation to the search

[40] The magistrate, however, still found him to be a truthful witness. This finding cannot be faulted. Ndabeni's uncertainty about the exact quantity of tik and the place where the tik and other items were found, is entirely explicable in the context of the above circumstances and is not such as to impugn his credibility.

[41] The magistrate was also correct that Ndabeni's evidence, subject to the above concessions, corroborated that of Majuba in all material respects. More particularly, he confirmed that Mitchell started running as soon as he saw the police vehicle approaching and that Majuba gave chase. He confirmed that Mitchell ran towards the car of the appellant and got into the front passenger seat. He further confirmed that both the appellant and Mitchell were searched by Majuba and that drugs were found on both of them. Although he could not corroborate Majuba's evidence as to exactly where the other drugs and equipment was found, he could confirm that Majuba showed them to him after he conducted a search inside the vehicle.

[42] The magistrate, having found both Majuba and Ndabeni to be credible witnesses, and there being no reason to interfere with such findings, there is no merit in the ground of appeal raised by the appellant which suggests that the trial court levelled criticism against the evidence of Majuba, rendering the evidence of Ndabeni as uncorroborated in respect of material issues.

Assessment of the Appellant's Evidence

[43] A factor considered by the magistrate in assessing the appellant's credibility is the contradiction in the version put to Majuba on his behalf during cross-examination and the appellant's version during his own evidence. The record reflects that it was put to Majuba by the appellant's attorney that the appellant observed Majuba approaching in advance and accordingly, he had an opportunity to dispose of any unlawful substances (had they been in his possession, which he denied) before Majuba reached him. Despite Majuba's protestations during cross-examination that the appellant did not see him and accordingly did not have an opportunity to dispose of the drugs, the appellant's attorney persisted with this line of

questioning. Contrary to the version put to Majuba in this regard, the appellant testified that he did not see Majuba approaching the vehicle as he was on the phone at the relevant time.

[44] The appellant was confronted with why the version that was put to Majuba on his behalf differed from his evidence under cross-examination. At no point did he state that he never instructed his attorney to make those statements on his behalf. It is therefore reasonable to assume what was put to Majuba during cross-examination was in accordance with instructions he provided.

[45] In assessing the credibility of a witness, one of the factors which a court may take into account is “*external contradictions*” in what is put on his behalf to witnesses compared to his own evidence.²⁵ The magistrate can therefore not be faulted for considering the contradiction in what was put to Majuba in cross-examination compared to the version which the appellant gave during his own evidence.

[46] Moreover, if regard is had to the probabilities, the appellant’s version that Mitchell was unknown to him is highly improbable and was clearly designed to distance himself from the commission of the offence. It is inconceivable that the appellant would fail to mention this fact to Majuba, during the search and arrest, particularly where tik was found on Mitchell, and by the appellant’s own account, not on the appellant’s person nor in the vehicle but rather on the ground in close proximity to where Mitchell was standing. The appellant also offered no explanation as to why he did not query the reason for his arrest, there and then, in circumstances in which he maintains that neither the tik nor the equipment was found on him or in the vehicle. That he did not do so defies logic and is against the probabilities.

[47] There is also no merit in the ground of appeal raised by the appellant that the magistrate erred in not finding that there were material corroboratory aspects between the evidence of Bacor and the appellant. They might have corroborated each other in respect of where the drugs were found, but in other material respects, most notably the search of the motor vehicle, they contradicted each other. The appellant’s evidence was that Majuba conducted a thorough search inside the

²⁵ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* 2003 (1) SA 11 (SCA) at para 5.

vehicle but found no incriminating evidence. He testified in detail about how Majuba searched the vehicle, and that he ripped out the sound box in the process but still came up empty-handed. The searching of the vehicle and the failure to find any incriminating items during the search is a material aspect of the appellant's version.

[48] Bacor in contrast testified that the vehicle was not searched on the scene and that Majuba stated that the vehicle would be taken to the station where a search would be conducted. So convinced was Bacor that no search was conducted on the scene in his presence that the failure to conduct the search on the scene was later, he alleges, the subject of a concern he raised with his commander, Captain Matthys, once his shift ended. The magistrate therefore correctly held that the appellant and Bacor contradicted each other in material respects.

[49] The above inconsistencies were not the only difficulties that the magistrate identified in Bacor's evidence. Bacor was a notably unimpressive witness who saw fit to change and adapt his evidence on many occasions. By way of example, he initially testified that as the tik and equipment was found under the car and not on the appellant (or in the vehicle), he having formed the view that that the appellant's arrest was "*unlawful*". Notwithstanding this, he accepted that the officers effecting the arrest held a different view and he accordingly took no action to raise concerns relevant to what he had witnessed. When probed during cross-examination regarding his inaction after witnessing a purported illegality, including the absence of an entry in his pocketbook relevant to the incident, Bacor altered his version, stating that he had reported the incident to his commander and that he had offered to make a statement as to what he had witnessed. He later testified that he was satisfied that the arrest was lawful as the appellant could very well have disposed of the drugs by discarding them from the vehicle. The notion that he did not initially view the arrest as unlawful was irreconcilable with the notion that he raised any concerns with Captain Matthys at all. When confronted with this anomaly, he was forced yet again to adapt his evidence. This time, his view regarding the illegality of the arrest remained unchanged, but he changed the nature of the complaint made to Captain Matthys. It was now no longer about an unlawful arrest, but about his colleagues excluding him from the search of the vehicle. The magistrate was rightfully critical of

Bacor's evidence and held that, insofar as it differed with that of Majuba, it could not be accepted.

[50] In my view, the contradictions, inconsistencies, and lack of inherent probability in the evidence of the appellant and Bacor justified the magistrate's rejection of their versions, insofar as it conflicted with the established evidence of Majuba and Ndabeni. I could not find that he committed any misdirection in this regard.

Possession versus Drug dealing

[51] The appellant submitted that the trial court erred in finding that the state had proven the offence of dealing in drugs.

[52] The magistrate did not provide reasons as to why he convicted the appellant on the main count, as opposed to the alternative charge of possession of an undesirable dependence producing substance.²⁶ Therefore, a further issue in this appeal is whether the evidence led at the trial supports a conviction for dealing in an undesirable dependence producing substance, as opposed to possession thereof.

[53] The phrase "*deal in*" is defined in the Act as "*performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.*"²⁷

[54] While there is direct evidence that the appellant possessed the drugs, there is no direct evidence that the appellant was performing any of the above-mentioned acts which constitutes dealing in drugs as contemplated in the Act. The State relied entirely on circumstantial evidence in respect of the main charge.

[55] Therefore, the only way the appellant could, on the evidence before the trial court, have been convicted on the main count of dealing in drugs, is through inferential reasoning. The benchmark case for the correct approach when dealing

²⁶ The appellant was charged in the alternative with a contravention of section 4(b) of the Act.

²⁷ Section 1 of the Act.

with inferences to be drawn from circumstantial evidence is *R v Blom*²⁸ in which the following was stated:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[56] In this matter, and on the accepted evidence:

(a) Mitchell stood on a street corner and started running as soon as he saw a marked police vehicle approaching.

(b) He was chased by Majuba on foot. As Majuba closed in on him, he got into the front passenger seat of a vehicle, parked diagonally on a gravel road.

(c) The appellant, who sat in the driver’s seat of the vehicle, switched on the ignition as soon as Mitchell got into the front passenger seat.

(d) Majuba ordered both of them to exit the vehicle, whereafter both men were searched.

(e) A small packet of tik was found on Mitchell and a “money bag”, containing approximately 30 small plastic packets of tik was found in the appellant’s back trouser pocket, as well as R212 on his person.

(f) On searching the vehicle driven by the appellant, a small scale and spectacle case, in which a spoon and small plastic packets that looked similar to those found on the appellant, were found. Such equipment is routinely used by drug dealers for the portioning and measurement of drugs.

[57] In such circumstances, the inference that the appellant was engaged in conduct that constitutes the act of dealing in drugs as defined in the Act, and more

²⁸ *R v Blom* 1939 AD 188.

particularly, conduct associated with the *supply, sale, and/or transmission* thereof, is consistent with the above proven facts. There is no other reasonable inference that can be drawn therefrom.

[58] The State must adduce proof beyond reasonable doubt, but that does not mean that it has to prove the guilt of the accused beyond a shadow of a doubt.²⁹ The position was set out as follows by the court in the matter of *S v Van der Meyden*:³⁰

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.”

[59] On a conspectus of the evidence before the trial court, I am satisfied that the State discharged the onus of proving its case, on the main charge, against the appellant beyond reasonable doubt.

[60] The conviction on the main charge of dealing in an undesirable dependence-producing substance must therefore be confirmed and the appeal on the conviction must be dismissed.

Sentence

[61] It is trite that the imposition of a sentence is within the discretion of the trial court.³¹ An appeal court will only interfere with that discretion if the sentence is so shockingly disproportionate to what the appeal court would have imposed that it

²⁹ *S v Phallo and Others* 1999 (2) SACR 558 (SCA) at para 11, recounting the words of Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 (King’s Bench).

³⁰ *S v Van der Meyden* 1999 (1) SACR 447 (W), at p448f – g.

³¹ *S v Rabie* 1975 (4) SA 855 (A) at p857D-E.

warrants interference.³² An appeal court may also interfere with a sentence upon a finding of a material misdirection by the trial court.³³

[62] In addition to the grounds of appeal relevant to the sentence imposed, to which I have already referred, the appellant's counsel argued that the trial court failed to properly consider the personal circumstances of the appellant, and in doing so, over-emphasised the seriousness of the offence and the interests of society. I do not agree.

[63] The trial court, in sentencing the appellant, was alive to the fact that it was to impose a sentence which struck an appropriate balance between the seriousness of the offence of which the appellant was convicted; his personal circumstances; and the legitimate expectations and legal interests of the community.³⁴

[64] In terms of section 17(e) read with section 13(f) of the Act, any person who is convicted of dealing in an undesirable dependence-producing substance shall be liable to imprisonment for a period not exceeding 25 years, or to both such imprisonment or such fine as the court may deem fit to impose. The sentence imposed by the trial court of eight years, four of which were suspended, was on the lower end of the maximum period of imprisonment.

[65] The offence which the appellant has been convicted of is a serious offence. This is evidenced by the fact that the legislature has ordained that imprisonment of up to 25 years may be imposed. It is not difficult to understand why. Dealing in undesirable dependence-producing substances, such as tik, results in grave harm to others and is a scourge on society. Courts should ensure that the sentences that they pass have the requisite deterrent effect, whilst still giving due consideration to the four objectives of punishment.³⁵

³² *S v Malgas* 2001 (2) SA 1222 (SCA) at para 12.

³³ *S v Malgas*, *supra* at para 12.

³⁴ *S v Zinn* 1969 (2) SA 537 (A).

³⁵ Namely, its deterrent, preventative, reformatory and retributive aspects.

As set out in *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA).

[66] The personal circumstances of the appellant presented from the bar in the trial court is that he is a first offender. He is married and his wife is a member of the South African Police Service. At the time of the sentencing, he was employed at a company named Gravity, for approximately three years, earning between R8 000 and R9 000 per month. The company's business involves excavations and laying cables. He has two daughters who were at the time of sentencing, aged 21 and 27 years respectively.

[67] Whilst it cannot be said that the appellant is not a useful member of society, his personal circumstances must however be balanced against the seriousness of the offence and the interests of society.

[68] In *S v Randall*³⁶, the court considered the seriousness of the offence of a contravention of section 5(b) of the Act and stated the following regarding drugs and the act of trafficking in drugs:

"Society is at risk should it hesitate to use every legitimate mechanism to its disposal to protect itself against their destructive designs."

[69] In refusing to interfere with an effective sentence of eight years' imprisonment for dealing in cocaine, the court held further as follows:

*"Having weighed the strong personal mitigating factors against the interest of the community, I have come to the conclusion that this Court is not justified as a Court of appeal in interfering with the sentence imposed by the magistrate. He has not misdirected himself neither is the sentence so severe that we are entitled to upset it. Combating the importation and distribution of dangerous drugs requires a multi-pronged strategy. Effective policing, control over ports of entry, training of police and other protective services, expertise in investigation and control, the education of our youth are some of the important components of a protective shield against the destructive impact of the illegal trade in dependence-producing substances. However, 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."*³⁷

³⁶ *S v Randall* 1995 (1) SACR 559 (C) at p566i

³⁷ *S v Randall*, supra at p567b - d

[70] There is no question as to the seriousness of the offence and the legitimate expectations and legal interests of the community. Regard being had to what I have set out above, I am of the view that a custodial sentence was, in the circumstances, appropriate, the personal circumstances of the appellant having been considered, and the four objectives of punishment necessarily having been catered for in the manner in which the sentence was structured. The sentence imposed by the trial court neither induces a sense of shock nor is it unjust. In such circumstances, the appeal against the sentence must fail.

Order

[71] Accordingly, the following order is issued:

[1] The appeal against the conviction and sentence is dismissed.

[2] The conviction and sentence imposed by the court *a quo* is confirmed.

**G APPELS
ACTING JUDGE OF THE HIGH COURT**

I agree.

**I BANDS
JUDGE OF THE HIGH COURT**

**Heard: 8 October 2025
Delivered: 12 February 2026**

APPEARANCES:

For the appellant: Mr. V.M. Sojada

Instructed by: Legal Aid South Africa
MAKHANDA

For the respondent: Ms. H. Obermeyer

Instructed by: The Director of Public Prosecutions
94 High Street
MAKHANDA