IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE

AR355/09

SAGREN NAIDOO **Appellant**

versus

THE STATE **Respondent**

Judgment

Delivered on 27 October 2009

Steyn J

[1] The appellant, Sagren Naidoo, was convicted in the Magistrates' Court Chatsworth on three (3) counts of dealing in dangerous dependence-producing substances to wit heroin also known as diacetylmorphine, contravening section 5(b) read with sections 1, 13(f), 17(e), 18, 19, 25 and 64 read with Schedule 2, Part 111 of the Drugs and Drug Trafficking Act, 140 of 1992. All three counts were taken as one for the

purposes of sentence and he was sentenced to imprisonment for a period of 12 years.

[2] The appellant who was legally represented during the trial pleaded not guilty to all the charges and offered a bare denial, when asked for a plea explanation. The appellant's conviction was based on the evidence of a controlled entrapment operation.

[3] With leave of the Court *a quo*, the appellant appeals against his conviction and the sentence imposed. The foundational ground of the appeal with regard to the merits, is based on the fact that the learned Magistrate committed a misdirection when he found that the trap executed in terms of section 252A of the Criminal Procedure Act, 51 of 1977[1] was lawful and in accordance with the law and that he erred in the credibility findings made by him. With regard to the sentence it is submitted on behalf of the appellant that the Magistrate misdirected himself when he over-emphasised the interests of society and failed to sufficiently take into account the personal circumstances of the appellant.

[1] Hereinafter referred to as 'the Act.'

In addition it is submitted that the sentence imposed is startlingly disproportionate, and induces a sense of shock.

The Law

[4] In *S v Van Pittius and Another*[2] Corbett J (as he then was) criticised entrapment in the following way:

> *"The artificial propagation of crime by means of police traps has "many distasteful features" (see R v Clever 1967 (4) SA 256 (RA) and the authorities cited therein) and its justification is based partly upon the belief on the part of the authorities that the accused has been engaged in criminal conduct of a similar nature in the past and is likely to continue to do so unless checked. The fact that an accused has to be importuned several times before agreeing to the criminal conduct proposed by the trap hardly indicates a general predisposition upon his part to commit this type of crime and this is, generally speaking, not an appropriate case for an artificially generated offence. Moreover, this kind of approach offends against the belief that the trap should be a fair one and that in general verbal persuasions should be avoided (see R v Clever (supra at 258))."*

[5] Initially after the enactment of s 252A, in my view, diverse opinions existed with regard to the admissibility of evidence obtained by a trap. In *S v Reeding*[3] where Bozalek J aligned himself on the onus that rests on the state with the view

2 1973 (3) SA 814 (C).
3 2005 (2) SACR 631 (C).

expressed by the authors of 'Commentary on the Criminal Procedure Act', in the following terms:

> *"The approach to be adopted in considering the admissibility of trap evidence and which marries the terms of s 252A(2) and s 35(5) advocated by Du Toit et al (at 24-134), is to consider, using the criteria listed in ss (2), whether admission of the evidence has without doubt not rendered the trial unfair or is otherwise not detrimental to the administration of justice. In my view this standard of proof is appropriate in the context of determining the admissibility as opposed to the weight of the evidence and moreover sets the bar too high. Section 252A(6) provides instead that an onus rests on the State to prove the admissibility of evidence on a balance of probabilities. This, in my view, is the correct standard of proof, if Du Toit's general approach is to be followed."*[4]

Our SCA has recently dealt definitively with the admissibility of evidence obtained through an entrapment operation in *Kotze v The State*.[5] In *Kotze, supra*, it was decided that the decision as to the admissibility of evidence should be taken in accordance with the provisions of 252A in the light of all the proved facts. In my view, the dictum is sound and in accordance with our common law and constitutional jurisprudence. The court held:

> *"Whilst the section refers to the burden being discharged on a balance of probabilities, it is in my prima facie view incompatible with the constitutional presumption of innocence*

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4 *Op cit* at 639-640.

5 [2009] ZASCA 93 delivered on 15 September 2009.

> *and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt. That a confession was made freely and voluntarily and without having been unduly induced thereto must be proved beyond reasonable doubt and I can see no practical difference between that case and the case where a conviction is based on the evidence of a trap. Each deals with the proof of facts necessary to secure the admission of the evidence necessary to prove the guilt of the accused. In my prima facie view therefore, and in the absence of argument, in order for the evidence of a trap to be admitted, it is necessary that the trial court be satisfied that the basis for its admissibility has been established beyond a reasonable doubt. That was the case here, for the reasons set out below, so this issue does not affect the outcome of this appeal."*[6]
> (Original footnotes omitted).

[6] The approach of a court dealing with the admissibility of evidence involving the use of a trap is succinctly stated by Wallis AJA in the following words:

> *"The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted."*[7]

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6 *Kotze supra* at para [20].

7 *Kotze supra* at para [23].

[7] The discretion to exclude evidence unconstitutionally obtained has always been part of our law.[8] Such discretion has been eloquently stated by Lord Steyn in *Respondent v Latif* [1996] 2 CR App R92 "HL" when he stated:

> *"The weaknesses of both extreme positions leaves only one principles solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed." (AT 100-101)*[9]

Our Constitutional Court pronounced on the admissibility of evidence unconstitutionally obtained in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*.[10] Kriegler J stated it as follows:

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8 The common law discretion has not been rendered redundant by the provisions of s 35(5) of the Constitution, 1998. For a discussion of evidence unconstitutionally obtained see *Schwikkard and Van der Merwe 'Principles of Evidence'* 2nd ed, at 168-208.

9 For a discussion of entrapment under English Law see *JMT Labuschagne 'Die verweer van lokvinkbetrapping in die Engelse reg: 'n Nuwe Wending'* THRHR, 297-301.

10 1999 (7) BCLR 771 (CC).

> *"Under the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded. If not, there is no basis for excluding it. There is no warrant for creating a general rule which would exclude cogent evidence against which no objection can be leveled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad."*[11]

[8] The background to the case is that Inspector Pillay, a member of the Durban Organised Crime Unit, received information about heroin dealing. As a result of the information obtained he established that the appellant was involved in illegal trading. He initiated a project to target the illegal trading and made application to the Director of Public Prosecutions in terms of s 252 of the Act. Subsequent to the authority that was granted he approached inspector Reddy to operate as the undercover agent in this covert police operation named Delta Seven. Two controlled purchases were made on 10 March and 17 March 2006. At the first purchase 50 loops of heroin was bought at the price of R40 per loop, in total R2000 was spent. At the second purchase 64 loops of heroin was bought.

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[11] Op cit at 820A-C.

The evidence of inspector Pillay was that the third purchased was planned to be the ‘busting operation’. The officers decided on some signals and a strategy that should be followed. The agent was given notes to the value of R3000 that was photocopied prior to the deal.

Once Pillay received the pre-arranged signal, he called upon all the officers. The undercover agent, Reddy, confirmed that the deal went through but that it had only been for 25 loops of heroin at R1250. The balance of the money was handed over to Pillay.

The record reveals that they then searched the premises of the appellant and when the appellant was personally searched he had R1250 in his possession. When Pillay, however, compared copies of the trap money with the money in the appellant’s possession it did not correspond. Through further investigation R1250 was found in the kitchen cupboard and when the officer

asked who it belonged to the appellant responded by saying that it belonged to his wife.

The cash seized from the cupboard was compared with the copies of the trap money and it matched. This verification of the notes was done in the presence of the appellant and he confirmed that it matched.

[9] Inspector Reddy, the undercover agent, also testified for the State and confirmed that he acted as a purchaser of the aforesaid drugs. He also implicates the appellant as the dealer and the person who negotiated the price and who handed him the heroin on the first and second purchase.

He confirmed that on 31 March he was asked to buy 60 loops of heroin. He was given R3000 and followed the procedure and strategy as discussed. When he requested 60 loops, he was informed by the appellant that he could only get 25 loops, since the appellant was waiting for more stock. He gave the appellant the money and was asked to return in five minutes, the

appellant even admonished him that he should be careful because the police were in the area.

The rest of his evidence confirms Pillay's earlier testimony.

[10] The third witness who testified was Captain Nundlall, who confirmed what was required of inspector Reddy. He took part in the exercise on 31 March 2006, and confirms that Reddy was searched and that the operation proceeded. He explained that other members were also involved and how he contained the crowd gathering at the gate of the appellant's property.

The forensic analysis of the drugs seized was proved in terms of s 212 statements, which were admitted as correct by the defence.

This concluded all the witnesses that testified on behalf of the State.

[11] For the defence the appellant and his wife who was the second accused in the court *a quo* testified.

In brief, the version tendered by the Appellant was that he was framed because he had laid a charge against a certain police officer, Ajith Ganesh.

According to him, he never sold any drugs to inspector Reddy and saw the officer for the first time on the day of his arrest. It is his version that his wife, him and his daughter, went to the Sparksport Pharmacy to go and purchase a ticket and that on his return, the police arrived at his premises. They could not enter the premises because of the presence of his two dogs, and threats were then made that the dogs would be shot and he then tied the dogs up to allow the police access onto the premises. He was immediately arrested and handcuffed. He denied that he had any knowledge of any drugs.

The version of the appellant changed as the trial went by. At the initial stages it was alleged that there were no drugs and no

trap money found at his house. The appellant however when he was cross-examined acknowledged that money was found and after further probing questions were put, that the money match the copies in possession of the police. In essence this evidence in cross-examination strengthens the evidence of inspector Pillay who explained that the money in the cupboard was shown to the appellant and that he admitted that it corresponded with the copies in the police's possession.

I do not consider it necessary to evaluate the evidence of the appellant's wife. She was acquitted on all counts after the learned Magistrate considered the evidence against her, which was distinguishable from the evidence against the appellant, to be insufficient to prove beyond a reasonable doubt that she possessed the drugs found in a wardrobe in one of the bedrooms.

[12] The judgment shows that the Magistrate was very much alive to the application of the cautionary rule and that the single witness, inspector Reddy's evidence should be satisfactory in

all material aspects. The record reflects that he considered all the merits as well as the demerits of the case. He carefully dealt with the defence raised by the accused, namely that he was framed and that the police conspired against him.

[13] In dealing with the appellant's claim of the case being fabricated, the Magistrate considered it as follows in his judgment:

> *"Once again, if this was to be a concocted story, it would have been a simple exercise. There was money found. It could easily have been claimed to match. Pillay goes further. He says that the drugs that were allegedly recovered in the house were handed over to him by another member. That member has not been called but if he wanted to concoct the story to make sure that it was not going to go awry he could have said; "I found the drugs . . ."*

[14] In my view the reasoned judgment albeit an *ex tempore* judgment shows a careful consideration of all the evidence, a critical analysis of all the probabilities and a due consideration of the merits.[12] The judgment furthermore shows convincingly why the evidence of the appellant was not credible nor in accord with the probabilities. My duty is not to consider whether

[12] See *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i-140b.

the judgment is beyond any criticism, what is required is to consider whether there was any misdirection related to the facts or the law. In my view the learned Magistrate was justified in convicting the appellant.

[15] It is trite law that if a dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged evidence may be considered as correct as confirmed in *S v P*[13] and *S v Boesak*.[14] A number of issues were raised in the appellant's submissions to this court that were left unchallenged in the court *a quo*. I am however of the view that none of the arguments and submissions raised by the appellant indicated persuasively that the trial court acted irregularly and misdirected itself in a material respect to the conviction, which would have entitled this Court to interfere with the conviction.[15]

[16] In my view no misdirection by the Magistrate have been shown, and none can be found. The only question that remains is

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13 1974 (1) SA 581 (RA) at 582 E-G.
14 2001 (1) SA 912 (CC) at 924 D-F.
15 See *S v Hadebe and Others* 1997 (1) SACR 64 (SCA) at 645e-f.

whether as was argued the sentence of the appellant is strikingly inappropriate.

Ad sentence

[17] That a distinction should be made between trafficking in cannabis and more dangerous drugs like heroin has been recognised by the SCA in *S v Xaba and Another*[16] when the Court held:

> *"Cannabis merchants and heroin merchants thus face the same maximum penalty. No one will dispute that the contraband dealt in by the one is more destructive than that dealt in by the other. In fact, the Act says so. The lesser evil of cannabis has been judicially recognized at the highest level. The worst imaginable case of heroin dealing, involving consignments worth millions, would attract a penalty of twenty five years imprisonment and no more. It is possible that some dagga dealing operation might evoke the kind of moral indignation that would justify an equivalent sentence, but it would have to be a most unusual case, perhaps involving a recidivist offender in an organized crime context."*[17]

[18] On behalf of the appellant Mr Ungerer referred us to a number of cases[18] and argued that comparable sentences were

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16 2005 (1) SACR 435 (SCA); also see *S v Nkabinde* 1993 (1) SACR 6 (A) wherein the Court recognised the differentiation in the approach to sentences in respect of cannabis as opposed to dangerous substances.

17 *Op cit* at para 13.

18 *S v Sebata* 1994 (2) SACR 319 (C); *S v Homerade* 1999 (2) SACR 319 (W); *S v*

imposed but for far larger amounts of drugs than in the present matter. In my view each case should be decided upon its own facts and its own merits I align myself with the view express by Van den Heever JA in *S v Sinden*:[19]

> *". . . . 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. Each case should be dealt with on its own facts, connected with the crime and the criminal."*

It is however acknowledged that in *S v Anthony*[20] the Court considered the average sentence for dealing in cocaine and heroin, if such a sentence exists, is a sentence between 5 and 10 years imprisonment. In the present matter the appellant had been convicted on 3 charges of dealing in heroin. This aspect shall be returned to, when I deal with the appropriateness of the imposed sentence.

[19] To submit that the Appellant was not a large-scale dealer, under circumstances where the appellant dealt in dangerous substances on three different occasions, is to ignore the

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Jimenez 2003 (1) SACR 507 (SCA).

19 1995 (2) SACR 704 (A).

20 For reference of this unreported case see *Antwi v S* [2006] JOL 17440 (W) at http://www.mylexisnexis.co.za/nxt/gateway.dll, accessed 23/10/2009.

culpability of the appellant. The same argument loses sight of the fact that the appellant was a persistent drug dealer.

[20] The Drugs and Drug Trafficking Act 140 of 1992 prescribes the penalty for a contravention of section 5(b) (which prohibits dealing in illegal substances) as being ". . . imprisonment for a period not exceeding 25 years to both such imprisonment and such fine as the court may deem fit to impose."

The seriousness of the offence should be gleaned from the penalty clause. In my view, possession of a drug and dealing[21] in the very same drug should be distinguish the one from the other. And when a court imposes a sentence it should be considered that dealing is a far greater evil and deserving of a harsher sentence than the mere possession of the drug.

[21] It is trite law that a court will only interfere with a sentence if a court misdirected itself in passing sentence. Moreover a

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[21] See section 1 of the Drugs and Drug Trafficking Act 140 of 1992, which defined 'deal in' as follows:

> *"'deal in', in relation to a drug includes performing any act in connection with the transhipment impartation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug."*

misdirection alone does not suffice for a court of appeal to interfere, such misdirection should be material. As expressed by Trollip JA in *S v Pillay*:[22]

> *". . . 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."*[23]

[22] In *S v Malgas*[24] Marais JA elaborated on the test as follows:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. 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*

22 1997 (4) SA 531 (A).
23 *Pillay supra* at 535E-F.
24 2001 (1) SACR 469 (SCA).

> *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."*[25] *(my emphasis).*

[23] The relevant personal circumstances of the appellant raised at sentencing were:

(i) That he is 39 years old and unemployed. He was previously employed as an administrative clerk;

(ii) That he has been married for 19 years and has two children 19 and 15 years of age;

(iii) That he takes care of an elderly family member of 70 years who lives with him and his family;

(iv) That he has a bond of R160 000 on the home in Chatsworth and an overdraft facility of R10 000. He experienced financial problems;

(v) That he is a first offender.

Two sentencing reports were handed in, the one prepared by the Department of Correctional Services and the other by a

[25] At para12.

social worker employed by the Department of Social Welfare and Population Development, KwaZulu-Natal (Exhibits E and F).

A reading of the record and the aforementioned reports reveal that even though Ms Naidoo recommended a sentence of correctional supervision in terms of s 276(h) of the Act, that the bulk of her report is dedicated to the appellant's drug dependency and not the fact that he was convicted on three counts of dealing in dangerous dependence – producing substance.

Much of the report by Ms Naidoo was based on the appellant's remorse and that he is making amends in terms of working with the community to rectify the harm done. Once more the trial record does not reveal such remorse being expressed by the appellant.

[24] I have duly considered the court *a quo's* sentencing judgment and am not convinced that the learned Magistrate had under

emphasised the personal circumstances of the appellant. The appellant showed no remorse and the personal circumstances listed at the court *a quo* cannot outweigh the public's need for protection.

[25] I am in agreement with the sentiments expressed by both Olivier JA in *Jimenez*[26] and Steyn AJ in *S v Randall*[27] when she remarked in the latter case as follows:

> *"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."*[28]

[26] Having considered all the circumstances of the appellant and the interests of the community, coupled with the seriousness of the offence, I am of the view that the sentence imposed by the court *a quo* is not disturbingly inappropriate. The sentence may

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26 *Jimenez v S* [2003] 1 All SA 535 (SCA) at para [21].
27 1995 (1) SACR 559 (C).
28 *Op cit* at 566i-567a.

appear at first glance to be harsh but once the repetitiveness of the offence is considered it is not. I am of the view that the court should be mindful of the message that it sends out to the public and other drug dealers. The appellant was prepared to risk his liberty by profiting from other people's addiction to drugs and should be appropriately sentenced. Whatever sentence is imposed should be clear and unequivocal, to sell hard drugs, like heroin, is not worth any amount of money.

In my view 12 years imprisonment imposed by the court was not inappropriate nor disproportional. There is accordingly no basis on which to interfere with the sentence passed.

[27] Accordingly the appeal against conviction and sentence is thus dismissed.

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Steyn J

Jappie J: I agree, it is so ordered.

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Jappie J