IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 18/11/14

CASE NO.: A473/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

DATE _____ SIGNATURE _____

In the matter between:

SIBUSISO GIVEN MWELASE Appellant

and

THE STATE Respondent

JUDGEMENT

DE VOS J:

[1] The Appellant was convicted in the Belfast Regional Court on one count of theft. Appellant pleaded guilty to the theft charge and was duly convicted. The Appellant, who was legally represented during his trial, was sentenced to two (2) years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, Act no. 51 of 1977. Leave to appeal against the sentence was granted by the Court *a quo* on 3 October 2013. He was also granted bail pending the finalisation of this appeal. Before granting leave to appeal the Magistrate made the following remark:

> *"This is one of those cases where it was really difficult for me to send the Accused to prison because I feel that the seriousness of this offence and the deterrence that this*

sentence must, or the deterrent message that this sentence must send out, must be clear not only to the Accused but to likeminded people, and that is the reason why his personal circumstances had to give way to the other factors in this case.

There is in my opinion a reasonable possibility that another Court might come to a different conclusion not only with regard to a different sentence, but also on the issue of whether there should be a custodial sentence here or not, and on that basis I have decided then to grant the Accused leave to appeal".

[2] It is common cause that a Court hearing an appeal should be careful not to erode the discretion of the Trial Court and would be justified to interfere only if the Trial Court's discretion was not judicially and properly exercised which would be the case if the sentence that was imposed is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[3] The Magistrate accepted the following factual admissions made by consent between the Accused and the State:

3.1 At the time of the incident, the Appellant was employed at Kumani Mine as a "truck assistant";

3.2 On the date of the incident, and whilst on duty, he stole explosive equipment to whit; 2 x Vipa Boosters and 2 x electric detonators from JED or Jan Duvenhage;

3.3 The value of the explosive equipment was unknown;

3.4 He appropriated the property by removing it from the truck and placing it into his personal bag and therefore removing it from the mine premises;

3.5 He was of the intention to sell it to another person namely Daniel, who, according to him, was also in the construction industry;

3.6 Before he could sell the items, he was arrested, seemingly on the same day he committed the theft.

[4] The initial correctional supervision report compiled by Mr Nkabinde was reviewed by the witness and he accordingly supplemented his report. The undisputed finding contained in the supplemented or corrected report as contained in the correctional supervision report and the probation officer's report was that the Appellant is an ideal candidate for correctional supervision as a sentencing option as provided in s 276(1)(h) read with s 276(A) of Act 51 of 1977. As said before, the Magistrate decided not to apply the provisions of s 276(1)(h) but imposed a sentence in terms of s 276(1)(i) of Act 51 of 1977. Counsel for the Appellant contends that the Magistrate misdirected himself by imposing direct imprisonment as aforesaid. It is contended that the seriousness of the offence was overemphasised to the detriment of the Appellant's personal circumstances and that the sentence imposed will only serve retribution and general deterrence; whilst ignoring individual deterrence and rehabilitation. The State contends that the Magistrate did not misdirect himself and did not overemphasise retribution and general deterrence thereby ignoring individual deterrence and rehabilitation.

[5] In my view, the Magistrate thoroughly considered the seriousness of the crime, especially in the light of the following circumstances. In his plea explanation the Appellant says he was going to sell the explosives to a certain Daniel, who was an Angolan businessman. In reality this man was unknown to the Appellant as the said Daniel telephonically requested him to sell the explosives to him. Although Daniel told the Appellant that he was in the construction business, the Appellant did not know whether this was true or not, but, Appellant still intended to sell it to him. The

Appellant could not have known what Daniel intended doing with the explosives. In my view the stealing of explosives at mines should not be underestimated. It is well known that there are many mines in the Belfast, Middleburg, Witbank, Secunda area. Thousands of people make a daily living from the mining industry. As far as the community interest is concerned there cannot be any doubt that the theft of explosives with the intension to sell it to an unknown foreigner must be regarded as serious. The Magistrate carefully and diligently examined these aspects before imposing sentence.

[6] The Magistrate then weighed up the personal circumstances of the Appellant against these other factors. The personal circumstances of the Accused have been dealt with in great detail in the reports placed before the Court. Briefly summarised, it can be said that the Appellant is 27 years of age, he is unmarried and has two children. Both children are 2 years old and stay with their respective mothers. He and his mother help with the upbringing of the children by contributing food and clothes. The Court duly considered the career path followed by the Appellant up till now. The magistrate found in the Appellant's favour that according to the information he is a very promising young man. He is currently involved in a leadership programme at South African Airways, where he studies as a trainee aircraft mechanic. His student information and results obtained during this programme confirms his true potential. After weighing up all these factors against each other, the Magistrate concluded that direct imprisonment in terms of s 276(1)(i) is the only appropriate sentence.

[7] Counsel for the Appellant referred me to several cases where correctional supervision was imposed. In S v Kruger 1995(1) SACR 27 (A) a security official at a meat company was convicted by a Regional Court of theft of meat valued at R10

000,00 from his place of employment and he was sentenced to 30 months imprisonment, 15 months of which were suspended on certain conditions. A correctional official testified that the said Accused was not a suitable candidate for correctional supervision as he lived in a dangerous area which made visitation difficult. The Court of Appeal held that punishment could be imposed in that case without having to resort to imprisonment. Accordingly, the appeal was upheld, the sentence was set aside and the case was remitted to the Regional Court for reassessment. In S v Nel 1995(2) SACR 362 (W) the Appellant was convicted in the Regional Court for the theft of 51 diamonds valued at R75 000,00 from his employer. He was sentenced to 5 years imprisonment of which two years were suspended on certain conditions. The Court of Appeal found that correctional supervision was an appropriate sentence under the circumstances. The Appellant in that case was born in 1948, was married and had 4 children. He had one previous conviction for unlawful dealing in diamonds. The Court of Appeal held that the interests of the community did not require that the Appellant be sentenced to imprisonment. In the light of the fact that two years have already passed since the imposition of sentence, the case was remitted to the Trial Court to establish whether correctional supervision was still an appropriate sentence. In the case of S v Kasselman & Another, 1995(1) SACR 429 (T) two young policemen committed theft by stealing R400 000,00 which was to be used in a police trap. They were initially sentenced to 5 years imprisonment in terms of s 276(1)(i). On appeal their sentence were substituted with 3 years correctional supervision as it was found that they were first offenders, useful members of society and not criminals in the true sense of the word.

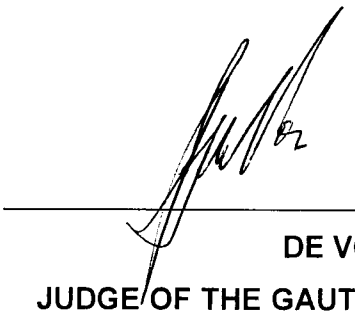
[8] To summarise the thrust of the Appellant's argument is that the Magistrate misdirected himself and failed to sentence the Appellant in a balanced manner.

[9] In my view it is clear that there is no misdirection on the part of the Magistrate. The Trial Court seriously considered the personal circumstances of the Accused, the sentence recommended by the correctional officers, and applied his mind to all factors before imposing the sentence it imposed. A Court will be reluctant to interfere with the sentence of a Trial Court unless it can be shown, *inter alia,* that the sentence is strikingly shocking or that the Court has misdirected itself. See S v Petkar 1988(3) SA 576 (A). The Magistrate further considered that the Appellant was in a position of trust in relation to the company when he stole the explosives. He also took into account the inherent dangers in the manner in which the Appellant handled the explosives. He further considered the fact that the offence was premeditated and planned. He further considered that the Appellant weighed up the benefits attached to the crime against the risks involved. He also considered the gravity of the crime and aggravating features *in casu* as well as the societal needs for an effective deterrent. He weighed these facts up against the personal circumstances of the Appellant and concluded that the nature, seriousness and prevalence of the offence and the interest of society justify the imposition of a term of imprisonment.

[10] In my view the Magistrate did not misdirect himself and I do not find the sentence imposed to be shockingly inappropriate. I therefore propose that the appeal against sentence should be dismissed.

ORDER:

The appeal against sentence is dismissed.



DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

I agree and it is so ordered.

MAVUNDLA J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT