

SOUTH AFRICA / JUDGMENT

Gogwane v S (CA&R61/2016) [2016] ZANCHC 59 (12 August 2016)

[2016] ZANCHC 59

COURT

Northern Cape High Court, Kimberley

BEFORE

Olivier, SL Erasmus

CASE / FILE NUMBER

CA&R61/2016

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case number: JA 78/10

Case No: CA& R 61/2016

Heard on: 01/08/2016

Delivered on: 12/08/2016

In the matter between:

LAWRENCE GOGWANE

APPELLANT

And

THE STATE

RESPONDENT

Coram: Olivier J et SL Erasmus AJ

JUDGMENT ON APPEAL

ERASMUS AJ

- [1] The appellant, Mr Lawrence Gogwane, appealed against his conviction and the sentence imposed by Mr CJ Els, the Magistrate of Daniëlskuil in the district of Postmasburg.

- [2] The appellant was charged with contravening section 5(b) read with the provisions of sections 1, 13, 17, 25 and 64 of the Drugs and Drug Trafficking Act, 140 of 1992 ('the Act'). The State alleged that on or about 4 July 2010 the appellant had dealt in an undesirable dependence-producing substance, to wit 346 Methaqualone (Mandrax) tablets, a substance listed in Schedule 2, Part III, of the Act. The annexure to the charge sheet contains an averment that the State will rely on the presumptions contained in section 18, 19 and 22 of the Act.
- [3] The appellant pleaded not guilty and submitted a written plea explanation indicating the basis of his defence. He denied that the bag in which the Mandrax tablets were found belonged to him and further denied any knowledge of the contents of the bag. He averred that the bag belonged to 'Dan', a person to whom the appellant provided a lift and accordingly denied that the tablets were under his control. In terms of s 115(2) of the Criminal Procedure Act, 51 of 1977 (the CPA), he made the following admissions:

3.1 That the police found the tablets in his possession;

3.2 That the tablets were packaged, sent and analysed correctly;

3.3 That the tablets contained methaqualone.

- [4] The State called two witnesses. They corroborated each other in all material respects and their evidence was accepted by the court a quo. The State's version was that the police had received information that drugs were to be delivered at the appellant's

home. The police officials proceeded to the house of the appellant. On their arrival they found the appellant behind the

steering wheel of a vehicle, in the process of reversing out of the erf. The police followed the vehicle until it entered another erf, situated a short distance away, and parked behind the vehicle. The appellant attempted to reverse, but could not do so because the police had parked behind the vehicle. The appellant alighted from the vehicle and proceeded in the direction of the house. He was prevented from entering the house. The vehicle driven by the appellant was searched and the Mandrax tablets, found inside a plastic bag which had been placed inside another draw string bag, were seized. The bag was found on the front passenger seat of the vehicle, right next to the appellant.

- [5] It was put to the State witnesses that the appellant had been accompanied by another male ('Dan') and a child.

According to the first state witness, who had proceeded to the vehicle from which the appellant had alighted, the appellant was

alone throughout the period that they had observed him and there was no other person in the vehicle. According to the second state witness, she initially could not see how many people were inside the vehicle. The appellant was alone though when he alighted from the vehicle and there were no other people present at the scene. The appellant neither provided an explanation on the scene where the tablets were found, nor at the police station.

- [6] The appellant testified and called his wife as a defence witness. He testified that he was accompanied by a child and Dan at the time of his arrest. The appellant alighted from the vehicle, followed by Dan. Dan ran to his house on the premises where the appellant had parked. The child had accompanied Dan. The three police officials on the scene did not make any attempt to apprehend Dan. The appellant insisted that he had told the police that the bag belonged to Dan. The appellant's wife corroborated his version in as far as she had observed that Dan had entered the appellant's erf and that he and the appellant had left with her sister's 6-year old child.
- [7] Although raised in his heads of argument, Adv JF van Heerden, on behalf of the appellant, he did not persist and argue before us that the learned Magistrate misdirected himself during the credibility findings and evaluation of the evidence and in accepting the evidence of the State witnesses. It is trite that a court of appeal should not lightly interfere with a trial court's evaluation of the evidence and that it can do so only where there has been a clear misdirection in this regard. We are satisfied that the Magistrate was correct in accepting the version of the State and rejecting the appellant's version.
- [8] It is common cause that the legal representative of the appellant, as well as the Magistrate, were under the impression that the presumption contained in section 21(1)(c) of the Act found application. It is common cause further that this, on the side of the Magistrate, constituted misdirection as the relevant presumption had been declared to be unconstitutional.[1] The relevant section read as follows:
- "If in the prosecution of any person for an offence referred to-*
- (c) in section 13(e) or (f) it is proved that the accused conveyed any drug, it shall be presumed, until the contrary is proved, that the accused dealt in such drug;"
- [9] Mr Van Heerden submitted that the conviction stands to be set aside because of misdirection as the appellant's right to a fair trial had been violated because of the Magistrate's reliance on the presumption. He referred to the decision of *MOLOI AND OTHERS v MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS*[2] in support of his argument.
- [10] In the cases referred to by Mr Van Heerden the charge had been found to be defective in that the presumptions contained in section 21 of the Act had been referred to in the charge sheet. The charge was found to be incompetent and that the accused had been prejudiced by the defective charge in the proper conduct of his case and thus his right to a fair trial had been infringed.[3] In paragraph [28] it was stated:

“...The residual enquiry is whether, if the respective charge-sheets had been properly framed to exclude the offending presumptions, they might well have elected to mount their defence or response to the charges differently. In S v Hugo it was held that, where the State elects to make representations on the charge-sheet upon which it relies, the accused is entitled to regard these as exhaustive and to prepare his defence in respect of these representations, and no other. In R v Alexander and Others, quoted with approval in S v Pillay, the purpose of the charge-sheet was found to be –

'to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him.'" (footnotes omitted)

[11] In S v DANIELS AND ANOTHER[4], where the charge sheet also referred to the presumptions contained in section 21 of the Act and it was accepted that this had constituted

an irregularity, Heher JA stated the test to be applied by a court of appeal as follows:

‘There is therefore, within the scope of s 322(1)[5], no room for approaching any irregularity or defect in the record or proceedings (including the charge or indictment) as per se nullifying a conviction in a criminal trial. The task of a court seized with an appeal is to reassess the evidence without the influence of the irregularity or defect, in order to determine whether a conviction must inevitably have followed. In applying that test it may be that the irregularity or defect is so inseparable from the whole that a fair trial is necessarily excluded. Thus, if the court cannot conclude that, in the absence of the irregularity, the accused would have conducted his defence in the same fashion, it would be unlikely to conclude that there has been a fair trial. In that sense the effect of the irregularity or defect may be to nullify the conviction (ie the conviction would be 'fatally irregular'). But that will usually only be determined on a conspectus of the full trial record and not, as seems to be suggested in Tshali, simply by identifying the irregularity and typifying it as 'fundamental'.

[12] A court of appeal may therefore only interfere with a conviction based on a defective charge if an accused had been prejudiced by such charge and there had been a failure of justice. The test for such a failure has been established in S v CARTER[6] and requires

“... the appellate court to exclude from consideration all aspects of the trial that were affected or influenced by the irregularity, and to evaluate only the evidence that remains unsullied. If, on considering that rump, a conviction would inevitably have followed, there has been no failure of justice...”[7]

[13] The case before us is to be distinguished from the Moloi-case and the cases referred to therein as the State did not rely on the provisions of section 21 of the Act and there is no reference in the charge to such presumptions. The learned Magistrate misdirected himself in relying on the presumption which had been declared unconstitutional.

- [14] The approach to be applied by a court of appeal where the court a quo had misdirected itself on the law or the facts is trite. The court of appeal is then free to come to its own findings and establish whether the appellant is actually guilty beyond reasonable doubt.[8]
- [15] In terms of section 309(9) of the CPA a conviction (or sentence) may not be set aside because of an irregularity unless the irregularity resulted in a failure of justice.[9] The appellant is required to show actual prejudice.[10]
- [16] The factual findings of the court a quo and evaluation of evidence in casu are not affected by the misdirection of the Magistrate. We cannot conclude that the appellant would have conducted his defence in any other manner. His defence was that he had no knowledge of the Mandrax tablets and his version was correctly rejected by the court a quo.
- [17] The only issue that remains is whether the evidence warrants the inference, as the only reasonable inference, that he was guilty of dealing in the Mandrax tablets.[11] Ms Mabaso, for the respondent, submitted that the only reasonable inference was that he was dealing in the substance. We agree.
- [18] The appellant was alone in his vehicle. A substantial number of Mandrax tablets, to wit 346 tablets, were found in a bag in the appellant's vehicle, right next to him. He had driven from his own residence to another residence with the tablets in his vehicle. It is highly improbable that he, if he had possessed the tablets for his own use, would have kept it in his vehicle and then travel with same to another house. He did not proffer any explanation and, in court, the appellant denied knowledge of the tablets. This version was rejected.
- [19] There is no duty on this court to speculate in favour of the appellant. We are satisfied that the facts of this case

warrants a conclusion that the appellant was dealing in the Mandrax tablets and the conviction on a charge of contravening section 5(b), read with section 13(f) of the Act. This being so, we do not deem it necessary to deal with the submissions of Mr Van Heerden pertaining to a possible conviction on a charge of contravention of section 4(b) of the Act.

- [20] In respect of the sentence of nine (9) years imprisonment, imposed by the court a quo, Mr Van Heerden submitted that the sentence is shockingly inappropriate and that the learned Magistrate over-emphasized the seriousness and prevalence of the offence and misdirected himself in placing Mandrax in the same category as Cat, Tik, Heroin and Cocaine.
- [21] The issue in respect of an appeal directed at sentence is whether the court a quo properly and reasonably exercised the discretion bestowed on it when imposing sentence.[12] This can entail, even in the absence of material misdirection, that this court may yet be justified in interfering with the sentence when the disparity between the sentence of the trial court and the sentence which we would have imposed is such that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

[22] The appellant was not a first offender and has a previous conviction for contravening section 5(b) of the Act. The details of this offence do not appear from the record. On 12 August 2003 he was sentenced to five (5) years imprisonment of which one year was suspended for four (4) years on certain conditions.

[23] Although the facts of each case and the personal circumstances of the accused differ, it can be of assistance to look at other cases where similar offences had been committed.

23.1 In the case of *S v BARTLETTE*[13] the appellant was convicted of dealing in and distributing drugs which included 48 ecstasy tablets, 2 grams of heroin, 9 LSD tablets, 1 full moon cocaine crystal, 2 half-moon cocaine crystal, 1 quarter cocaine crystal, 3 grams of cocaine, 7 grams of heroin, 150 ecstasy tablets, 10 grams of heroin and another 10 grams of cocaine. The total value of all these drugs amounted to R26,000.00. He had no relevant previous convictions. The sentence of twelve (12) years imprisonment was confirmed on appeal.

23.2 In the case of *AUGUST & ANOTHER v S*[14] the appellant were convicted of dealing in 299 tablets of Mandrax (Methaqualon) valued at R12,000.00. The appeal was directed at the conviction only. The first appellant was sentenced to three (3) years imprisonment, two (2) years of which were to run concurrently with the sentence he was serving on the date of sentencing. The second appellant was sentenced to twelve (12) months imprisonment.

23.3 In *GAMEDE AND ANOTHER v S*[15] the appellants were convicted in the regional court Durban for dealing in 556 kilograms of methaqualone (commonly known as mandrax), the value of which were estimated at R50 million. A mandrax manufacturing operation was in progress on both farms where the appellants were arrested. They were each sentenced to a term of 20 years imprisonment. The sentence in the case of the first appellant was found to be unjustifiably excessive, given the fact that the evidence establishes

no greater role in the operation than to have assisted in attempting to dispose of the evidence. The second appellant was directly

involved with the manufacturing process and was a first offender. The appeal against the sentence was upheld and the sentence of the first appellant was substituted with a sentence of five (5) years and the sentence of the second appellant was set aside and substituted with a sentence of fifteen (15) years imprisonment.[16]

23.4 In the case of *S v MASIKE*[17] the appellant was convicted of dealing in 184 tablets and 15.69 grams of fragments and powder and sentenced to eight (8) years imprisonment of which two (2) years were conditionally suspended for a period of five years. He had one previous conviction for dealing in dagga. The appeal succeeded and the sentence was replaced with one of four (4) years imprisonment of which two (2) years were conditionally suspended for five (5) years.

23.5 In the case of GAVIN FRANS AND ANOTHER v S[18] the appellant was convicted of dealing in 61kg of dagga. He was sentenced to five (5) years imprisonment of which two (2) years were conditionally suspended for five (5) years. The appeal succeeded and the sentence substituted with one of three

(3) years imprisonment of which twenty (20) months were conditionally suspended for five (5) years.

[24] Having considered the facts of this case and taking into account the sentences that had been imposed in other matters of similar and more serious cases, we would have imposed a sentence of six (6) years imprisonment as court of first instance. There is striking disparity between that and the sentence of nine (9) years imposed by the court a quo.

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

1. The appeal against the conviction is dismissed.
2. The appeal on sentence succeeds and the sentence of nine (9) years imprisonment is set aside and substituted with the following:

“The accused is sentenced to six (6) years imprisonment.”

3. In terms of section 282 of the Criminal Procedure Act, 51 of 1977 the sentence is antedated to 06 January 2015.

SL ERASMUS

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur

CJ OLIVIER

JUDGE

For the Applicants: Adv. J.F. van Heerden (oio Andre Potgieter Attorneys)

For the Respondent: Adv. J. Mabaso (oio DPP)

[1] S v Bhulwana; S v Gwadiso [1995] ZACC 11; 1995

(2) SACR 748 (CC); S v Mjezu 1996

(2) SACR 594 (NC); Constitutional Court Order published under Government Notice No. R.585 in Government Gazette 212666 of 15 June 2000

- [2] 2010
- (2) SACR 78 (CC)
- [3] Moloi *supra* at para [15] and [26] – [28]
- [4] 2012
- (2) SACR 459 (SCA) at para [16]
- [5] This reference is to section 322 of the CPA
- [6] 2007
- (2) SACR 415 (SCA);
- [7] DANIELS *supra* at para [14]
- [8] R v Tusini & another 1953(4) SA 406 (A) at 412C-F
- [9] S v Seboko 2009(2) SACR 573 (NC); S v Keyser 2012(2) SACR 437 (SCA)
- [10] S v Lubbe 1981(2) SA 854 (C) at 860 A- B and F-G;
- [11] S v Mathe 1998(2) SACR 225 (O) at 228B – 229G
- [12] S v Kgosimore 1999(2) SACR 238 (SCA) at para [10]; S v Malgas 2001(1) SACR 469 at para [12]
- [13] (CA&R 92/07) [2008] ZANHC 5 (15 February 2008)
- [14] (01/08)
- [2011] ZANHC 14 (26 August 2011)
- [15] (161/2010)
- [2010] ZASCA 122 (30 September 2010)
- [16] (161/2010)
- [2010] ZASCA 122 (30 September 2010)
- [17] 1992(1) SACR 667 (A)
- [18] An unreported decision of the Northern Cape Division, Case no. CA & 201/2014

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