

SOUTH AFRICA / JUDGMENT

Khan v S (AR 55/10) [2010] ZAKZPHC 33; 2010 (2) SACR 476 (KZP) (7 July 2010) [2010] ZAKZPHC 33

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

K Swain, I Madondo

CASE / FILE NUMBER

AR 55/10

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REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 55/10

In the matter between:

HANIFA BEBEE KHAN

APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 07 July 2010

SWAIN J

- [1] The appellant appeals against her conviction of contravening Section 5 (b) of the Drugs and Drug Trafficking Act No. 140 of 1992 (the Act) – dealing in two hundred and forty three mandrax (methaqualone) tablets, as well as contravening Section 4
- (b) of the Act – possession of one hundred and fifty grams of cannabis (dagga) in the Magistrate’s Court for the district of Chatsworth.
- [2] The appellant was sentenced to five years’ imprisonment, half of which was suspended for three years, on condition that she was not again convicted of contravening Sections 4 (b) or 5 (b) of the Act, committed during the period of suspension.

- [3] The appeal against the conviction alone, comes before us with the leave of the Court a quo
- [4] Mr. Prior, who appeared for the appellant, attacked the conviction inter alia on the basis that an alleged “pointing out” by the accused of the drugs was inadmissible, because the police officers failed to warn the appellant of her right to remain silent and her right against self-incrimination, before she produced the drugs in question.
- [5] The evidence surrounding the production of the drugs by the appellant, as led by the State, was as follows:

[5.1] Sergeant Bhugoo stated that on the 28 August 2007 he, together with Inspector Naidoo, were performing crime prevention duties in the Unit 11 area of Chatsworth, when they received information concerning an Asian female by the name of Hanifa who resided at 1128 Block No. 2. The information was that she had drugs stored in a tuck shop situated at the rear of Block 2. The information they were given was that

“...if we go into the tuck shop, on the cross hand (sic) there’ll be an empty coke bottle crate. If you move the empty crate then you pick up the floor underneath. That’s where the drugs will be stored”.

They immediately travelled to the tuck shop which had a sign displayed on its exterior reading “Hanifas Tuck Shop”. The structure was what is referred to as a wendy house, being about three by three metres square. According to the witness it was supported at each corner by wooden poles, resulting in it being approximately thirty centimetres off the ground. On arrival at the tuck shop he saw the appellant seated on the floor, inside the tuck shop, counting some “copper change” on the floor between her legs, as the door was open. He identified himself to her as he was wearing civilian clothes and told her that he knew that she had drugs in the tuck shop. He then said the following to the appellant

“and you can make things easy and just hand it over to me and things will be easy on your side”

and he then said to her

“I am only giving you one minute to think about it”

[5.3] The appellant then said “Ok, you’re right” and went to the crate on the floor which had been described to the witness, moved the crate, lifted a wooden panel in the floor and produced a yellow plastic packet and a clear plastic packet, which were respectively found to contain the mandrax tablets and the dagga.

[5.4] The witness said he did not instruct the appellant to do this, she did it on her own because he had told her “....if she wants things to be easy on her part, she rather just take out things because it will be easier on her part”

[5.5] Once the appellant had produced the packets he then asked her permission to enter the tuck shop by asking

“can I come that side”

However, the appellant remained quiet and did not say anything.

[5.6] The witness then picked up the panel to see if it was empty but did not search the rest of the interior of the tuck shop. He then informed the appellant as follows

‘You are now being charged for possession of dagga and mandrax. You have the right to remain silent, you have the right to apply for bail and/or if you can’t afford one’

he then took her to the police station

“where she was charged formally by me [indistinct] she is given the 14 days to do it and then signed”

[5.7] Earlier in his evidence the witness had said

“the constitutional rights was read at the charge office when we were handing it over. I just informed her the information upon arresting her”

[5.8] He stated that they did not obtain a search warrant, because they believed what they were told as to where the drugs were stored, and because of the possibility that they could be moved, they did not have time to apply for one.

[6] Inspector Naidoo confirmed the manner in which the appellant produced the drugs and when it was put to him that the appellant had voluntarily handed over the drugs, he said the following

“after being convinced by Sergeant Bhugoo, I would say yes”

When asked to explain what he meant by convinced, he said the following

“Sergeant Bhugoo informed of her of the information that we had stating to her not to make things difficult for the police, us and for yourself. Co-operate with us, hand over, hesitated a few seconds then handed to us [indistinct] was removed and that’s how he convinced her by handing it over”

[7] The appellant however had an entirely different version of the events.

[7.1] The appellant said she was in the tuck shop when the police arrived. Sergeant Bhugoo said he had information that there were drugs in the tuck shop. She told him

“there is no drugs. I don’t know what drugs you are talking about. You can go ahead and search the tuck shop”

[7.2] The police then searched the tuck shop and found nothing. Sergeant Bhugoo then bent down outside the tuck shop and looked under the tuck shop. Using a stick he pulled a plastic packet from under the tuck shop, which contained a one litre milk container, which he opened. They then produced green and yellow tablets from the container and told her she was under arrest saying “this is mandrax”.

[7.3] One Viren Moonsamy who was standing there said to Sergeant Bhugoo

“Boss you know what, she doesn’t know anything about it. I know something about it”

to which Sergeant Bhugoo replied

“I don’t want to take you, I want to take the female and go”

The appellant stated that Viren Moonsamy wanted to be arrested but the police refused to take him.

[7.4] The appellant denied that the police had ever said to her, that if she wanted to make it easy on herself, she should just hand over the drugs.

[8] Viren Moonsamy was called and confirmed the appellant’s version of events and said that he had told the policemen, that the drugs were his and that the appellant knew nothing about the drugs. The response of the policemen was that they could not arrest him and had to arrest the appellant, because she had the keys with her. Despite his pleas they refused to arrest him.

[9] No challenge was raised by the defence as to the admissibility of the evidence relating to the production of the drugs, obviously because of the appellant’s denial that it had ever occurred.

[10] It is clear on the State’s evidence that the police did not warn the appellant of her rights before they effectively told the appellant to hand over the drugs.

[11] A consideration of the following authorities, dealing with the issue of whether an individual is entitled to be informed of his/her rights prior to the stage when he/she is arrested, is therefore necessary.

S v Sebejan & others 1997 (1) SACR 626 (W) at 631 a – f

S v Ndlovu 1997

(12) BCLR 1785 (N) at 1791C

S v Langa & others 1998 (1) SACR 21 (T) at 26 i – 27 b

S v van der Merwe 1998 (1) SACR 195 (O) at 199 i – j

S v Mthetwa 2004

(1) SACR 449 (E) at 453 E

S v Orrie & another 2005 (1) SACR 63 (C) at 69 a

[12] On the facts of this case it cannot be said that the police at the relevant time had assumed control over the movements of the appellant

R v Mazema 1948 (2) SA 152 (E) at 154

with the intention to arrest her. Obviously until such time as it was established that their information as to the presence of drugs in the tuck shop was true and accurate, there were no grounds to justify her arrest.

[13] In Ndlovu, a decision of this Court, Magid J, in whose decision Nicholson J concurred, held that those sections of the interim constitution, which dealt with the rights of an accused and a detained person, were not of relevance in that case, because at the relevant time the accused had not been arrested or detained (at 1791 C) but were prepared to assume for the purposes of the decision in that case, without deciding the issue, that the underlined portion of the following dictum of Satchwell J in Sebejan at 632 H was correct

“In short, non-suspects may be questioned without any cautions or warnings, whereas suspects, even in circumstances where answers to questions may establish innocence, should receive the benefit of a caution or warning. The suspect is treated differently and entitled to certain protective cautions not afforded to a mere witness”

[14] The reservation of Magid J was based upon the fact that Satchwell J, in coming to the conclusion that she did inter alia, relied upon the provisions of Rules 1 and 2 of the Judges’ Rules.

Rule 1 provides as follows:

“Questions may be put by policemen to persons whom they do not suspect of being concerned in the commission of the crime under investigation, without any caution being first administered”.

Rule 2 provides as follows:

“Questions may be put to a person who is under suspicion where it is possible that the person by his answers may afford information which may tend to establish his innocence. In such a case cautions should first be administered”.

[15] Magid J’s reservation arose from the fact that it had been held in both

R v Holtzhausen 1947 (1) SA 567 (A) at 569/570

R v Kuzwayo 1949

(3) SA 761 (A) at 768

“that compliance or otherwise with the Judges’ Rules was relevant only to determine whether the statement elicited from the accused was made freely and voluntarily. That, held the Court, was a matter of fact whose determination depended on all the circumstances, including whether the Judges’ Rules had been complied with”.

Ndlovu supra at 1791 I

Magid J then went on to add the following :

“Even in the climate of a culture of human rights which we now enjoy, I am not convinced that this line of authority is wrong”

and then as pointed out above, went on to make the assumption for the purposes of that case, that the relevant dictum in Sebejan was correct, but found on the facts that the accused was not a suspect in any event.

[16] In Sebejan, Satchwell J held at 636 b as follows:

“No less than an accused is the suspect entitled to fair pre-trial procedures. These include the rights which would accrue to an accused when arrested: the right to remain silent and the right to be informed of the right to remain silent; the right to be informed of the consequences of making any statement; the right to choose and to consult with a legal practitioner and to be informed of this right promptly”.

[17] The approach adopted in Sebejan did not find favour in Langa where MacArthur J, in whose judgment Mynhardt J concurred, held that the right to remain silent and the right not to be compelled to make an admission, which could be used against an individual, as encapsulated in Sections 25 (2) (a) and (c) of the Constitution Act 200 of 1993 (the Interim Constitution) were not applicable, as the accused in that case had not been “arrested” as provided for in Section 25 (2), nor had the accused been “detained” as provided for in Section 25 (1). The Court declined to follow the dicta in Sebejan, holding that the discussion on the rights of suspects was obiter, as the accused in that case was held not to be a suspect

Langa supra at 26 i – 27 c

[18] In van der Merwe, Gihwala A J had to deal with the question of whether the investigating officer, after warning the accused in terms of the Judges’ Rules, had in addition to draw the accused’s attention to the provisions of Section 25 of the Interim Constitution. He held there was no such obligation, expressing himself in the following terms at pg 199 i to pg 200 b:

“Ek kon niks in die Grondwet vind wat so ‘n verpligting op die ondersoekbeampte plaas nie. Ek dink dat die bepalings van die Grondwet aangaande die regte van aangehoudenenes, gearresteerdes en beskuldigdes saamgelees moet word met die bepalings van die Strafproseswet en ander gesag en dat dit nie in isolasie gesien moet word nie. Wanneer ‘n persoon volgens Regtersreëls gewaarsku word, word daar inderdaad in my seining uiting gegee aan die bepalings van die Grondwet want die aard en omvang van daardie Regtersreëls sal lei tot die behoorlike beskerming van die gearresteerde en/of beskuldigde se regte”

[19] In Mthethwa, Pickering J in whose judgment Sangoni J concurred, aligned himself with the reasoning of Gihwala A J in van der Merwe, as set out in the underlined portion of the passage quoted above, and held that the provisions of Section 35 of the Constitution were not of relevance, despite what was stated by Satchwell J in Sebejan, because at the time the appellant was questioned he was neither an arrested, nor an accused person. Pickering J went on to hold that the decisions in Ndlovu and van der Merwe were correct. The learned Judge then went on to find that the appellant was at the relevant time a suspect and entitled to be informed of his rights.

[20] In Orrie, Bozalek J, after reviewing the authorities set out above, endorsed the conclusion reached by Satchwell J that “no less than an accused a suspect is entitled to fair pre-trial procedures” going on to add the following at pg 69 h to pg 70 c:

“An interpretation of the relevant provisions of s 35 which extends them to suspects is, to my mind, in keeping with a purposive approach which has regard to the interests which the rights were intended to protect. Moreover, it accords with the views expressed by the Constitutional Court in S v Zuma and Others that the ‘right to a fair trial’ embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. It was held further in Zuma (supra) that all courts haring criminal matters must give content to he notion of ‘basic fairness and justice’. This approach is endorsed by the authors of South African Constitutional Law: The Bill of Rights. They observe that unless the Constitution’s pre-trial rights are extended to suspects as well, investigating authorities could simply leave potentially accused persons in the category of ‘suspect’, thus enabling themselves to collect evidential material from the ‘unwary, “unsilent”, unrepresented and unwarned suspect’ ”.

S v Zuma [1995] ZACC 1; 1995 (1) SACR 568 (cc) para 16

Cheadle, Davis & Haysom

South African Constitutional Law: The Bill of Rights

(Butterworths Durban

2002) at pg 631

[21] What is common to all of the above decisions is that “suspects” are entitled to “certain protective cautions”. The distinction however between the decisions in Sebejan and Orrie, on the one hand, and that in Ndlovu , Langa, van der Merwe and Mthetwa on the other, is the manner in which such “protective cautions” are extended to a “suspect” as well as the nature and ambit of such “protective cautions”.

[22] In my view, the provisions of Section 35 of the Constitution of the Republic of South Africa Act 108 of 1996 apply only to “arrested”, “detained” or “accused” persons. Due weight being afforded to the reasoning of Satchwell J in Sebejan and Bozalic J in Orrie, I am, with respect, not persuaded that the provisions of Section 35 of the Constitution are applicable to “suspects”. The rights of “suspects” are adequately catered for by the application of the well established provisions of the Judges’ Rules. I agree with the views of Gihwala A J in van der Merwe that “when a person is cautioned in terms of the Judges’ Rules actual expression is given to the provisons of the Constitution because the nature and extent of these rules lead to suitable protection of an arrested person’s and/or an accused’s rights”.

[23] As pointed out by Magid J in Ndlovu at 1792 D – E

“I do not minimise the necessity to abide by the constitutional rights of suspects. Equally however, it is important not to hamstring the police in their investigation of crime”.

[24] In my view, to cast an obligation upon the police, not only to caution a suspect in terms of the Judges' Rules, but also to advise him or her of the rights encompassed by Section 35 of the Constitution, would not serve to strike an even balance between these competing interests.

[25] On the present facts it is clear that at the time Sergeant Bughoo and Inspector Naidoo approached the appellant, she was a "suspect" in that the appellant was

"one about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved"

per Satchwell J in Sebejan supra at page 531 h – 632 d

[26] I agree with the reservation expressed by Magid J that the phrase "some apprehension" sets the standard too low

Ndlovu supra at 1792 b

The apprehension that is required, in my view, is a reasonable one. Such a requirement introduces an element of objectivity to the enquiry as to whether the person was in fact a suspect at the relevant time.

cf Ndlovu supra at 1792 C

[27] On the present facts Sergeant Bughoo and Inspector Naidoo both possessed a reasonable apprehension, that the appellant was a suspect in the offence under investigation. They were accordingly obliged to caution the appellant in terms of the Judges' Rules, before the appellant proceeded to produce the drugs in question. The fact that the appellant was legally represented at her trial, did not challenge the admissibility of the evidence of her production of the drugs and denied having produced the drugs at all, does not mean that any contention that she suffered prejudice in consequence of its admission, is purely speculative

Mthetwa supra at 455 i – 4546 b

cf S v Lottering 1999

(12) BCLR 1478 (N) at 1483 F – G

As pointed out by Pickering J in Mthetwa, it appeared from the State evidence itself in that case, as in the present case, that the appellant's rights were infringed by the policeman who questioned her.

Mthetwa supra at 456 a – b

[28] However, the Court has a discretion to admit evidence which has been improperly obtained. What has to be determined is whether the admission of the evidence, would render the trial unfair and bring the administration of justice into disrepute

Mthetwa supra at 456 b – c

[29] What has to be determined is whether the guilt of the appellant has been established beyond a reasonable doubt, if the evidence of the production of the drugs by the appellant, which was elicited by the questioning of the police, is excluded. If the guilt of the appellant is not established, then clearly the admission of such evidence would be prejudicial to the appellant.

[30] The crucial issue in such an enquiry is whether the remaining evidence proved beyond a reasonable doubt, that the appellant possessed the drugs in question. This involves proof that the

[30.1] appellant exercised physical control over the drugs in question.

S v Skhosana 1973

(1) SA 322 (O)

Whether the appellant possessed the drugs will depend on the extent to which she had actual control of the drugs, or was able to constructively control them

SA Criminal Law & Procedure – Vol III Statutory Offences 2ndEd

Milton & Cowling F 3 - 46

[30.2] the appellant had the intention to exercise physical control of the drugs

S v Thlabanelo 1986

(2) PH 130 (O)

In order for such intention to exist the appellant must at least be aware of the existence of the drugs, the fact that they were within her control and that they were drugs

Milton & Cowling *supra* and authorities there cited

[31] In order to determine this issue, the evidence relating to the nature and extent of the appellant's involvement in the running of the tuck shop, where the drugs were found, has to be examined. The appellant stated that the tuck shop belonged to one Dennis Francis, whom she referred to as her "ex son-in-law". One Viren Moonsamy was employed by Francis for the last three years to run the tuck shop. On the occasion when the drugs were found, Moonsamy had gone to buy stock for the tuck shop and had left the keys for the tuck shop with the appellant. Somebody had wanted to buy a cool drink so she opened the tuck shop to serve the customer. She denied the evidence of Sergeant Bughoo and Inspector Naidoo, that when the police arrived she was seated on the floor of the tuck shop, counting "copper change" on the floor between her legs, saying that only Viren Moonsamy counted the money. Viren Moonsamy confirmed the appellant's evidence that the tuck shop was owned by Dennis Francis, that he ran the tuck shop, and that he would leave the keys with the appellant when he went to buy stock, which he had done on the day in question. He confirmed that the only persons who had access to the tuck shop were Francis, the appellant

and himself.

[32] Sergeant Bughoo denied that the appellant told him she was not the owner of the tuck shop, did not work there on a permanent basis and that Viren Moonsamy was employed and in charge of the tuck shop. Sergeant Bughoo said that the appellant in fact said she was the owner of the tuck shop and the name of the tuck shop was “Hanifa Tuck Shop”. He also said that he had not heard of one Dennis Francis. Inspector Naidoo said he had no recollection of the appellant saying that Viren Moonsamy was employed in the tuck shop. Inspector Naidoo said that he could not recall if Sergeant Bughoo asked the appellant, who the owner of the tuck shop was, but on the front of the tuck shop was a sign with the appellant’s name reading “Hanifas Tuck Shop”.

[33] I am satisfied on the evidence that Sergeant Bhugoo and Inspector Naidoo were telling the truth as to the location where the drugs were hidden, which was in accordance with the detailed information they had been given. I am also satisfied that the appellant and Viren Moonsamy were not telling the truth when they maintained that the police had found the drugs inside a milk carton, contained in a packet, underneath the tuck shop. There could be no conceivable reason why the police would wish to concoct such a detailed story as to how and where the drugs were found, if they had found the drugs in the location alleged by the appellant and Moonsamy. The appellant, when asked, was unable to suggest any reason why the police would want to frame her and falsely implicate her. She agreed that if the police had wanted to falsely implicate her, they could have simply said they found the appellant looking at the drugs, without making up a false story as to how they found the drugs. Mr. Prior has referred us to contradictions between

the evidence of Sergeant Bhugoo and Inspector Naidoo. I have carefully considered these, but in my view they are not sufficiently

material to affect the credibility of these witnesses. In addition, I do not agree that the contents of a newspaper report of the arrest, in which reference was made to the drugs being found in a milk carton should have been admitted by the Magistrate, in terms of Section 3 of the Law of Evidence Amendment Act No. 45 of 1988, as contended for by Mr. Prior. If the appellant wished to rely upon this evidence, the author of the article should have been called by the appellant to establish the source of this information.

[34] Quite simply, the detailed evidence of the police as to the location where the drugs were hidden, has the ring of truth to it. A similar quality is possessed by the evidence that the appellant was seated on the floor of the tuck shop counting “copper change” between her legs, when they arrived. I find it inconceivable that the police would have thought it necessary to manufacture such

detailed evidence with the intention of establishing the appellant’s involvement in the running of the tuck shop, when to their knowledge at the time, the sign on the tuck shop read “Hanifas Tuck Shop”. I am therefore satisfied that the appellant’s denial that she was engaged in such an activity when the police arrived is not the truth. It is clear that the appellant’s purpose in such a deceit,

was to attempt to minimise her role in the running of the tuck shop, in order to weaken any inference being drawn, that she was aware of the drugs hidden under the floorboards of the tuck shop.

[35] When due weight is given to the fact that the appellant was untruthful as to the location where the drugs were found, as well as the nature and extent of her involvement in the running of the tuck shop, particularly as the appellant never denied that the name of the tuck shop was “Hanifas Tuck Shop”, I find the inference irresistible that the appellant was aware of the existence of the drugs, located under the floor of the tuck shop. Such awareness, combined as it is

with the evidence of the appellant’s involvement in the running of the tuck shop, has as a necessary consequence that the appellant had physical control over the drugs, as well as the intention to exercise such control.

[36] I am therefore satisfied that even if the evidence of the production of the drugs by the appellant is excluded, the remaining evidence establishes her guilt beyond a reasonable doubt. The admission of the evidence of her production of the drugs, would consequently not be prejudicial to the accused.

[37] In addition, I am satisfied that the admission of this evidence in all of the circumstances of this case, would not render the trial unfair and bring the administration of justice into disrepute

S v Hammer & others 1994 (2) SACR 496 (C) at 498 f – 500 f

for the following

reasons.

[38] It is clear that the information which Sergeant Bughoo and Inspector Naidoo had received as to the precise location of the drugs, namely that if an empty coke bottle crate on the floor of the tuck shop was moved, the floor in that location could be raised to reveal the presence of the drugs, was entirely accurate. When

Sergeant Bughoo was asked why they did not obtain a search warrant, he said they believed the information they were given was correct and there was a possibility the drugs could be moved, so there was insufficient time to apply for a search warrant. In terms of Section 22 (b) of the Criminal Procedure Act No. 51 of 1977, the police were entitled to search without a warrant, if they believed on reasonable grounds, that one would be issued if applied for, and the delay in applying for a warrant would defeat the object of the search.

[39] It is therefore clear that the production of the drugs by the appellant, did not play a material role in their discovery. The police would have lawfully located the drugs in any event, and the discovery of the drugs without the co-operation of the appellant, together with the other evidence set out above, would have resulted in the conviction of the appellant on the grounds I have set out above.

[40] I am therefore satisfied that the evidence of the production of the drugs by the appellant was correctly admitted, and in the result the appellant was correctly convicted.

The order I make is the following:

The appeal against conviction is dismissed.

K Swain J

I agree

I Madondo J

Appearances /

Appearances:

For the Appellant : Mr. P. Prior

Instructed by : Judy Reddy & Associates

Chatsworth, Durban

For the Respondents : Adv. D. Naidoo .

Instructed by Director of Public Prosecutions

Date of Hearing : 08 June 2010

Date of Filing of Judgment : 07 July 2010

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Prepared on 11 October 2026 · Esheria