

SOUTH AFRICA / JUDGMENT

Otto v S (AR 175/06) [2009] ZAKZPHC 22 (26 May 2009) [2009] ZAKZPHC 22

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Levinsohn, Niles-Dunér

CASE / FILE NUMBER

AR 175/06

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NATAL PROVINCIAL DIVISION)

CASE NO : AR 175/06

In the matter between :

MICHAEL JOHN OTTO

Appellant

and

THE STATE

Respondent

J U D G M E N T

LEVINSOHN AJP

[1] The appellant who I shall refer to as the “accused” was convicted by a Regional Court of the following drug related offences :-

Count 1 : contravening section 5(b) of the Drugs and Drug Trafficking Act No 140 of 1992 (dealing in an undesirable dependence-producing substance).

Count 2 : contravening section 22A(3) of the Medicines and Related Substances Control Act No 101 of 1965 (sale of a schedule 1 substance);

Alternative to Count 3 : a contravention of section 4(b) of the Drugs and Drug Trafficking Act No 140 of 1992 (possession or use of a dangerous dependence-producing substance);

Count 4 : contravening section 22A(3) of the Medicines and Related Substances Control Act No 101 of 1965 (sale of schedule 1 substance).

- [2] The appellant was sentenced on Count 1 to two years imprisonment, on Count 2 to four years imprisonment, on the alternative to Count 3, three years imprisonment and Count 4 five years imprisonment. The cumulative effect of the sentences imposed was fourteen years imprisonment.
- [3] On being arraigned the accused pleaded not guilty to all the charges and put the State to the proof of the various allegations made therein.
- [4] The State case in broad outline was the following.
- [5] Martinus Stefanus van Zyl was its principal witness. He is at present a captain in the South African Police Services. In 1996 he held the rank of sergeant and he was attached to the Narcotics Bureau in Cape Town. He was approached by the Durban Organised Crime Unit to undertake and assist in undercover operations. He

was tasked with infiltrating the drug syndicates and had to gather information in regard to the selling of drugs in nightclubs as well as the importation and exportation of drugs. Captain Small and Captain Erasmus were his handlers. The investigating officer was Inspector Kriel. He had to identify drug dealers who were suspected of being involved in drug trafficking. He was also tasked with concentrating on drug smugglers as well. To that end he concentrated on the nightclubs in the Durban area which he visited frequently. He gave the names of the various nightclubs concerned. He described how he visited the nightclubs at night and made contact with several drug smugglers. These persons in fact sell the drugs at the nightclubs. He clarified this by saying that the drug smugglers are in fact drug “peddlers”. Van Zyl said that when interacting with these various persons he had introduced himself as a photographer.

- [6] During this infiltration period he noted the characteristic clothing worn by these peddlers whose ages ranged between 16 and 18. They were openly dealing in drugs at the clubs selling LSD and Ecstasy.
- [7] Van Zyl said that while visiting these various clubs he noticed the accused on numerous occasions. The first time he met him was at a club called “Crowded House”. He came to know the accused as the owner of the “Crowded House” nightclub. He also noticed the accused at nightclubs like “Three Thirty”.

The accused was in the company of drug dealers from whom the witness purchased drugs.

- [8] The first time the witness approached the accused was at the Jam Lounge nightclub. He said he was standing outside and the witness stopped his vehicle and approached the accused and had a short conversation with him. That occurred on 28th January

1998. The next occasion when he saw the accused was on the 2nd February
1998. He met him at a nightclub called “Bonkers” He saw the accused sitting down and he approached him and told him he was interested in buying drugs and that he wanted “200 pille”. The English translation of that is “Ecstasy”. Van Zyl told the accused that he gets his tablets for R45 and the accused replied that that was a good price. Van Zyl also said to the accused that he wanted the drug LSD and he was able to get that at R25 a unit. He wanted
300. The accused replied saying that if he took 400 he would give it to him at R20 a unit. Van Zyl told him that he was on his way to Cape Town and would call him on his return. When he returned from Cape Town he visited a nightclub called Crash where he saw the accused. He asked the accused whether it was still in order for him to phone him and the accused answered in the affirmative.
- [9] On 20th February 1998 at approximately 1.15 in the afternoon he telephoned the accused. He asked him if he could see him in connection with the purchasing of drugs. The accused answered that he should come to the Electric Avenue nightclub that evening. The witness reported to Inspector Kriel that he was going to the club and the latter told him to proceed. At about 11 o'clock that evening he went to the club. He saw the accused standing behind the DJ box. He approached him. The accused told him that he could arrange 200 LSD units. He was also informed by the accused that he had Ecstasy as well. The latter drug was being sold for R50. Van Zyl said the accused called the barman over the intercom. The barman approached. The accused had a short conversation with him and he (the accused) instructed the barman to see how many tablets there were. The barman went towards a storeroom and later came back with a bank bag which contained seven brownish small tablets with a hammer and sickle. The accused then said the price was R350. The tablets were handed over to him and he in turn handed it over to the witness. When that happened the accused was standing close by. The barman in turn handed the money to the accused and he put that into his trouser pocket. The accused further informed van Zyl that he had 3 000 tablets which he could obtain after van Zyl had left the club. Van Zyl believed that these were Ecstasy tablets.
- [10] Van Zyl said that he took the tablets that had been sold to him and the next day he reported to the investigating officer Inspector Kriel that he had purchased same. They agreed to meet the following day at a spot behind the Botanical Gardens in Durban. When they met van Zyl informed Kriel that the accused had told him that a further 3 000 tablets were available for sale and they could set up another transaction. Van Zyl handed the tablets he had purchased to Kriel. The latter instructed him to do another purchase.
- [11] On 23rd February 1998 the witness contacted the accused. He told the accused he wanted 60 tablets. The accused instructed him to come to the Electric Avenue club in half an hour's time. Van Zyl reported to Kriel and Kriel instructed him to meet him behind the Botanical Gardens. On arriving at the Botanical Gardens Kriel searched him and his motor vehicle. He was handed R3 600 in cash whereupon he went to the club. The club was open, there was a barman on duty. The accused was not present and the witness waited approximately 20

minutes. The accused arrived. He shook his hand and they walked towards the door that the barman had entered into at the time of the previous transaction. In this room there was a shelf and on the shelf was a brown box and certain liquor bottles. The accused took out a bank bag containing capsules. The accused placed them on the table and said that there were 60 and it was the best. Van Zyl handed the money to the accused. He returned to the Botanical Gardens where he handed the tablets he had purchased to the

investigating officer.

[12] The next witness called by the State was Inspector Wickus Kriel the investigating officer in the case. Kriel described at length the circumstances leading up to van Zyl's role in the undercover operation to combat drug dealing in Durban. He confirmed that he had given instructions to van Zyl to target one Michael Otto. Van Zyl reported to him that on 20th February he had met with Otto and he was able to buy the drugs from him. Kriel instructed him to proceed. He received a report on 20th February 1998 that he had bought seven Ecstasy tablets from the accused. Kriel instructed him to keep these in his possession and he would collect them the following day. He did this and sealed it with the official seal. Van Zyl informed him that he was able to make a further purchase from the accused. Kriel requisitioned for cash and he met van Zyl at the Botanic Gardens. He handed him R3 600. He searched his vehicle and van Zyl's person and he proceeded to the accused's nightclub. Kriel followed him and stood on the roof of a building where one got according to him an excellent view of the entrance to the nightclub Electric Avenue. He said that after some time van Zyl emerged from the club and Kriel assumed that he had done the deal. As arranged they met at Botanic Gardens where

van Zyl handed him 60 capsules "of white substance". He took possession and he photographed and recorded the tablets as exhibits in SAP 13. According to Kriel this transaction took place on 23rd February 1998. The accused was not arrested for that transaction because according to Kriel "we still had a lot of other work that Sergeant van Zyl still had to do".

[13] Kriel believed that there were drugs on the premises and he accordingly made arrangements for a search of the premises. The search took place on 26th February. Upon searching the premises of the nightclub they found other tablets which resembled those that van Zyl had previously purchased. In addition another substance which was found eventually to be cocaine was discovered. Inspector Holamby also testified in regard to this search and he essentially confirmed the evidence of Kriel on this aspect

[14] Inspector Holamby said that a search warrant was obtained. The accused was not present at the time but one Chris was the manager of the premises. A search was conducted in a storeroom/office which Chris unlocked for the police officers. Holamby said that he found a box containing salt sachets and on top of that was a small parcel containing white powder which was found to be five grams of cocaine. They also found a bag full of capsules which they suspected to be Ecstasy.

- [15] In response to questions Chris said that he knew nothing about the drugs that were found and that they should talk to the owner of the premises, namely the accused. The accused was phoned. Inspector Kriel spoke to him and the accused arrived at the premises accompanied by his attorney. At that stage no-one was charged. According to Holamby the accused was charged some four months later.
- [16] With this brief summary of the salient features of the State case I now turn to the accused's evidence.
- [17] The accused said that during July 1998 he was approached by Inspector Holamby and confronted with certain allegations in regard to dealing in Ecstasy. He was charged with the incidents which occurred on the 20th and 23rd February 1998. In addition he was charged with being in possession of drugs and that related to the raid on 26th February
1998. The accused denied that he knew anything about the drugs that were found in the storeroom on that date. The accused admitted that he was involved in the nightclub called Electric Avenue. He said that there were four partners as well as managers running the business. According to the accused about four or five persons had access to the keys of that storeroom. Insofar as the incidents on 20th and 23rd February were concerned the accused said that he had never sold anything to van Zyl or anybody else at Electric Avenue.
- [18] The Regional Magistrate in her judgment found that van Zyl was "an excellent witness" who made a very favourable impression on her. She recorded that after a lengthy cross-examination van Zyl emerged as trustworthy and a witness whose evidence ought to be believed. On the other hand the accused according to her was "vague". "He gave unsubstantiated answers". She went on to record the following :

"The accused stated he did not know van Zyl but could not

advance any possible reason as to why van Zyl would choose to implicate the accused as no bad blood existed between them"

(page 263 of the record).

According to the Regional Magistrate the accused was not an impressive witness. He did not take the Court into his confidence but rather tried to be as hedgy and vague and as non-committal as could be". She accordingly accepted van Zyl's evidence and rejected the evidence of the accused as false beyond reasonable doubt. Hence a guilty verdict was brought in on the counts specified above.

- [19] In a very thorough and helpful argument Mr Slabbert has attacked these convictions. He has argued that the Regional Magistrate misdirected herself in certain important respects.

At the outset Mr Slabbert drew attention to the fact that this was a classical "trap" case. Over the years our Courts have emphasised that a trap whether he be a police official or a lay person may have a motive to secure a conviction which in the words of Alexander J in *S v Ramroop* 1991(1) SACR 555 at 559 G – I, "may override honesty". It is thus incumbent on the Court to view the

evidence of a trap with a degree of caution and circumspection. The application of this cautionary rule should be demonstrated in the reasons for judgment. Thus it seems to me that in the context of the events which unfold in a trapping case a trier of fact will look for corroboration of the trap where such corroboration ought to be revealed. Discrepancies between the trap and other witnesses will in this context take on an added significance in the evaluation of the overall credibility of a trap. I may say at once that there is no question that van Zyl's evidence was admissible having regard to the provisions of section 252(A)(2) of the Criminal Procedure Act. The issue is one of the weight to be attached to the evidence given by the trap.

- [20] In my view the Regional Magistrate misdirected herself in her approach to the evidence of van Zyl. She mentioned in her judgment the cautionary rules applicable to a single witness. Missing from this is the pertinent observation that the single witness is a trap and as mentioned above the trier of fact ought to demonstrate in the reasons given that it is safe to believe the trap witness. In my view it is dangerous to rely simply on demeanour and the impression made by the police witness. Such police witness would presumably have had experience in giving evidence before a Court and would make a good impression. Mere reliance on demeanour is not a reliable yardstick for judging credibility.
- [21] In my view in a trap case of this nature one expects the State to present a corroborative trail, that is to say, the facts and indeed records which support the evidence of the trap. Thus in the trap cases that I have encountered one find invariably evidence that a trap is searched, the money that is handed over to him is marked and he is kept under observation throughout the operation. After the trap is sprung the police that are supporting the trap search for the marked money which if found in the accused's possession serves as strong corroboration of the trap's evidence. Furthermore if the trap testifies that he made a cellphone call to the accused at a given time, these cellphone records are readily available and will show the call made by the trap to the accused's cellphone. Again, important corroboration of the trap's evidence. One would also expect the trap and his handler to keep notes in their respective pocketbooks detailing the unfolding of the operation.
- [22] In the instant case I am afraid that none of the above were presented by the State in evidence. It is also important to note that the case before the Regional Magistrate commenced some six years after the events that were described in the evidence. It cannot be acceptable that a witness such as van Zyl is permitted because of the passage of time to hide behind a fading memory. The precision and the detail which is required in a case of this nature can simply not be tested by the accused. That has implications as far as a fair trial is concerned. There is some suggestion in the record that the delay in charging the accused was due to various other cases which the State brought against the accused and other persons.
- Be that as it may the delay must inevitably be regarded as an unsatisfactory feature in the case.
- [23] Mr Slabbert has pointed to a number of improbabilities in van Zyl's evidence. It is sufficient for purposes of this judgment if I deal with some of these.

[24] With regard to the transaction on 23 February 1998 there is no doubt on van Zyl's evidence that there would have been a cellphone record trail of the conversations he had with the accused. After van Zyl had bought the seven tablets for R350 at R50 a tablet the accused told him that he had 3 000 Ecstasy tablets available. I agree with counsel's submission that since van Zyl's main task was to purchase drugs and trap the accused it is improbable that he did not make an arrangement with the accused in regard to the future purchase of these 3 000 tablets. His conduct appears to have been inconsistent with the main purpose of the exercise namely to trap the accused. Also one would have expected van Zyl to have discussed a price with the accused for the 3 000 tablets.

[25] Insofar as the transaction on the 23rd is concerned here again there is evidence from van Zyl that he contacted the accused by cellphone. This time he told the accused he wanted "60". He did not say 60 of what. It is improbable that Kriel would give him R3 600 when a few days before he had paid R350 for seven tablets which is R50 a tablet. One would have expected the witness to have paid R3 000 for the 60 capsules not R3 600. Van Zyl's explanation when confronted with the question why he arrived with R3 600 on this occasion he said :

"Your Honour, I must say that the tablets and the capsules were different. It was not the same product that I bought."

This answer does not bear scrutiny particularly in the light of his concession that he did not know what he was expecting to buy. He contented himself with the answer that that was the amount the investigating officer gave him. The latter told him to go and purchase the exhibits from the accused. He accordingly took the amount of R3 600 and went to purchase. Van Zyl said he could not remember the conversation with the accused on the telephone on the 23rd February. He did not record the contents thereof in his statement either. He said there was no agreement about a price to be paid for the purchase nor was he told how much money he had to bring with him. When pressed as to why he took R3 600 with him he said :

"Your Honour, I took R3 600 because that was the amount that the investigating officer gave me purchase the Ecstasy".

He admitted that neither he nor the investigating officer knew that it would be R60 a unit. He then fell back on fading memory and said he could not recall the conversation. Inspector Kriel in his evidence said that he had been told on the 21st about van Zyl's intention to make another purchase from the accused. That was fortified by his actions in drawing the necessary amount of money in preparation for the transaction on the 23rd. The following exchange took place between the cross-examiner and Kriel :

"Now you're ask – do you agree if his evidence in this court is that it's only on the 23rd at 11:20 – sorry, at 12:20, that is twenty minutes past twelve the day he phoned the accused, that evidence cannot fit in with your version. It's impossible because how would you have known how much money to go and draw? .--- The only reason I know is because he told me beforehand."

When further pressed Kriel said that van Zyl must have made arrangements prior to the 23rd.

- [26] Here again in the context of a trapping case this apparent discrepancy ought to have weighed heavily with the trier of fact. As I have said above, one expects that the evidence of the persons conducting the operation will be consistent in every material respect. Here we have an instance where a very important ingredient of the trapping operation is tainted with doubt. Corroboration in the form of cellphone records could easily have been obtained to back up the version of the State witnesses. These are noticeably lacking.
- [27] It is clear from Kriel's evidence that he did not properly observe or monitor van Zyl when he went into the club. The failure to keep observation throughout renders any trap and indeed this one very suspect.
- [28] It follows that I cannot agree with the magistrate's finding that the witness was an "excellent" one. In my view having regard to some of the important deficiencies in the State case to which I have alluded, a reasonable trier of fact would entertain serious doubts about the acceptability of the State case.
- [29] However one should eschew piecemeal reasoning. The evidence as a whole including the accused's evidence, must be weighed in the scales. Here again I am of the opinion that the magistrate's approach to the accused's evidence is vitiated by misdirection. In the first place the regional magistrate found that the accused could not "satisfactorily explain how he obtained the photograph which was submitted". The accused explained that he was with a group of people and was speaking about van Zyl's testimony to the effect that he never drank. He said a woman by the name of Angie who was part of this group said she knew van Zyl. He was out drinking with her one night and she had photographs of that particular party. She handed the accused the photograph. In my view this was a perfectly acceptable explanation.
- [30] A further adverse finding against the accused's credibility was made in regard to a person called Yolande. It was put to the witness van Zyl by counsel for the accused that this person Yolande knew van Zyl had bought the drugs for himself. The magistrate recorded that the accused had said he did not know Yolande. That was regarded by the magistrate as a contradictory feature in the accused's testimony. In my view this was a misdirection. Counsel for the accused explained to the court that it was he who had acquired the knowledge based on tape recordings which had been used in another drug related case. Those tape recordings had been made available to counsel by the State. In these there was a conversation between Yolande and van Zyl. The regional magistrate made a further finding which bore on the accused's

credibility :-

"The accused state that he did not know van Zyl but could not advance any possible reason as to why van Zyl would choose to implicate the accused as no bad blood existed between them."

One often encounters reasoning along similar lines from judicial officers in the lower courts. A finding of this nature is usually designed to demonstrate an improbability in the accused's evidence. This is faulty and judicial officers should avoid reasoning along those lines. In *S v Ipeleng* 1993(2) SACR 185 at 189 C - D, Mohamed J (as he then was) speaking in the Full Bench said the following :

"It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks : 'Why should the State witnesses have falsely implicated the accused?'"

In *R v Mthembu* 1956(4) SA 334 (T) at 335 – 6, very similar sentiments were expressed by Dowling J.

*"The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late Millin J in *Schulles v Pretoria City Council*, a judgment delivered on the 8th June 1950, but not reported, are very pertinent to this point; he says :*

'It is a wrong approach in a criminal case to say 'Why should a witness for the prosecution come here to commit perjury?'

It might equally be asked : 'Why does the accused come here to commit perjury?' True, an accused is interested

in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt."

[31] In the course of the judgment the regional magistrate found :-

"He admitted that he had discussed the trial with various other people who it later became known that these were accused in similar charges in other courts."

I agree with Mr Slabbert that it is unclear why the regional magistrate regarded that fact as sinister and adversely affected his credibility. That too was a misdirection.

[32] Insofar as the raid which took place on 26th February 1998 is concerned, it is clear that the accused was not on the premises when that took place. It was also established that other persons had access to that storeroom. It is indeed reasonably possible that those other persons could have placed the drugs in the storeroom without the accused's knowledge. It follows from this that on this record there is no basis to reject the accused's evidence which was to the effect that there were four partners as well as managers running the business and that four or five persons had access to the keys of the storeroom. The accused's evidence in this respect could reasonably possibly be true and no basis exists to reject it as false beyond a reasonable doubt. I find it unnecessary therefore to consider the legal issue in regard to "sale" as set out in count 4.

[33] Insofar as the purchases on the 20th and 23rd February 1998 were concerned, the fact that the magistrate's findings of credibility are vitiated by misdirection means that this Court is at large to consider the record as a whole and determine whether the guilt of the accused has been established beyond a reasonable doubt. In my view there is no basis on a consideration of the record to make that finding or to reject the accused's evidence as false

beyond a reasonable doubt. It follows that the convictions on Counts 1 and 2 cannot stand.

[34] To sum up then the appeal is upheld and the convictions and sentences imposed on Counts 1, 2, the alternative to Count 3 and Count 4 are set aside.

NILES-DUNÉR J

Date of hearing : 17 February 2009

Date of judgment : 26th May 2009

Counsel for the Appellant : S D Slabbert (instructed by Janice Selleck)

Counsel for the Respondent : P C Bezuidenhout (instructed by the Director for Public Prosecutions)

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