

SOUTH AFRICA / JUDGMENT

S v Abrahams (369/90) [1991] ZASCA 128 (27 September 1991)

[1991] ZASCA 128**COURT**

Supreme Court of Appeal

BEFORE

Botha, Milne, Nicholas

CASE / FILE NUMBER

369/90

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Source record**Case No 369/90 /wlb****IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION****In the matter between:**

EBRAHIM ABRAHAMS Appellant and THE STATE Respondent

CORAM: BOTHA, MILNE JJA et NICHOLAS AJA
DATE OF HEARING: 17 September 1991

DATE OF JUDGMENT: 27 September 1991

JUDGMENT

MILNE JA/

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MILNE JA:

The appellant was charged in the Magistrate's Court together with one Delia Jacobs (to whom I shall refer as Accused No 1) with contravening section 2(a) alternatively section 2(b) of Act No 41 of 1971 ("the Act"). The prohibited substance which was the subject of both the charges consisted of 173 tablets of methaqua lone. Accused No 1 pleaded guilty to the alternative charge but only in respect of 5 tablets. She was, however, convicted 'on the alternative charge in respect of all 173 tablets. The appellant pleaded not guilty to both counts but was convicted also on the alternative count and sentenced to a term of imprisonment. His appeal to the Cape Provincial Division was dismissed. With leave granted on petition to the Chief Justice, he appeals to this Court against his conviction and sentence.

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The appellant and Accused No 1 lived together as man and wife in what was described as a "hokkie". For reasons which will become apparent, the nature of this structure is of some importance. It was erected on certain premises in Paarl with the consent of the owner, who lived in a double-storied flat on those premises. The "hokkie" was constructed entirely of large pieces of cardboard held together with strips of adhesive substance (at one stage described as "plakpapier", at another stage as "tape"). The roof of the "hokkie" rested against the wall of the flat, but there was a gap between the wall of the flat and the wall of the "hokkie" nearest to it so that there was a passage between them which was referred to in the evidence as a "gangetj ie". This passage was narrow but high enough for a man to stand upright in it. It was open at both ends but at one end access to it was barred by a fence and at the other end there was a small chest ("h kassie") which could

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be moved aside to afford access to the passage. The "hokkie" had two rooms.

Only two witnesses testified at the trial, a Sgt Solomans for the State and the appellant.

The following facts are not in dispute:

- (a) On the day referred to in the charge sheet, Solomans, accompanied by a number of other members of the police force, including a Warrant Officer and a dog-handler with his "sniffer dog", arrived at the premises described above.
- (b) When Solomans arrived the appellant was in the back-yard of the premises together with a group of other men.
- (c) Solomans entered one of the rooms of the "hokkie"(which was not the room occupied by the appellant

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and Accused No 1) and found a woman and a young boy there. He carried out a search there with the assistance of the "sniffer dog" but this search revealed nothing unlawful - only a drum buried in the ground underneath the carpet of the room which drum contained nothing but potato bags. The appellant was a fruit and vegetable hawker who employed a number of others and some of the employees occupied this room with his permission. They had free access to the "hokkie" and 'to the passage already referred to and used to store vegetable sacks and liquor there. Solomans in fact found a case of beer and some empty beer bottles in a container in the passage.

- (d) Solomans then summoned the appellant from the back-yard to be present while his, the appellant's, room was searched.

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- (e) Solomans then searched under the bed in the room and removed portion of the wall of the "hokkie". Having done so, he put his head and shoulders through the hole in the wall created by his removal of part of the wall and, observing that the soil was loose at a particular point in the passage a short distance away, dug with his fingers in the ground and found a plastic bag concealed under the earth. In this bag there were 173 tablets containing methagualone.

There was initially some dispute about what occurred thereafter, but eventually Solomans agreed that when the appellant was confronted with the tablets he may have said that he was a hawker, that he had been away for two days and that he had no knowledge of the tablets. Furthermore, when Solomans showed the tablets to Accused No

-6-1. she said that they were all hers.

The appellant gave evidence. He confirmed that he had indeed been away from his home for two days on his hawker's business and that he had only returned home a few hours before Solomans and the other members of the police force had arrived. He also said that access could easily be gained to the passage by simply moving the chest to one side. Solomans certainly gave the impression that it was more difficult to gain access to the h le (where the tablets had been buried) by means of the passage than by removing part of the wall of the "hokkie" as he had done. His evidence on this and other points was open to serious criticism. Be that as it may, it is common cause that others beside the appellant and Accused No 1 had access both to the appellant's room and the passage.

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The magistrate did not find that the State had proved that the appellant had actual possession of the tablets but relied on the presumption created by section 10(3) of the Act. In the court a quo King J (with whom Van Heerden AJ concurred) came to the conclusion that actual possession had been proved. The basis upon which he did so was apparently the following:

- (1) The evidence of Solomans to the effect that when he confronted the appellant with the tablets, "Dit was vir my baie duidelik dat hy groot geskrik het, want hy was senuweeagtig".
- (2) The tablets were found "...in of by sy slaap-kamer in 'n gat in die muur by sy bed ...".
- (3) The appellant was the "huisbaas" of the "hokkie".

-8-I shall deal with these points seriatim.

I have considerable reservations about the reliability of Solomans's evidence. In his evidence in chief he said quite categorically that when he confronted the appellant with the tablets the appellant did not answer him. In cross-examination he was compelled to admit that the appellant may have said that he had been away for two days and knew nothing about the tablets. In his evidence in chief he refrained from disclosing what he later revealed namely, that he had had to remove a section of the wall in order to gain access from inside the appellant's room to the area where the tablets were buried. Initially he said it was not possible to gain access to the passage except through the appellant's bedroom. In cross-examination he was forced after some

prevarication to concede that if one removed the chest at one end of the passage it was quite

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feasible to gain access to the passage from outside the "hokkie". Be that as it may, even if one takes Solomans's evidence at its face value, the fact that the appellant was nervous when confronted by the police with the tablets found in the passage outside his "hokkie", is a neutral fact. It would be a natural reaction for a completely innocent person to be frightened and nervous if the police discovered a cache of drugs near his home.

There was no question of the tablets being found "in 'n gat in die muur by sy bed". This is a misreading of the evidence. The tablets were found buried in a hole in the ground in the passage outside the "hokkie" after the police had removed a section of the wall.

It is correct that it was the appellant who had been given permission to erect the "hokkie" and in that

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sense he was the "huisbaas". It by no means follows that he was in possession of everything in the "huis" and still less of everything in the vicinity of the "huis". There may well be cases where the fact that a person is the "huisbaas" of particular premises is significant e.g. as in *S v Mkize* 1975(1) SA 517 (A) at 524C-G but it is not a rule or principle of reasoning which is of universal application. It all depends on the particular facts of each case. The learned judge expressed himself as follows:

"Dit is moontlik dat ander persone ook van die teenwoordigheid van die Mandrax bewus kon gewees het, maar dit is heel duidelik uit die feite, na my mening, dat hy synde die huisbaas moes bewus gewees het van die teenwoordigheid van die goed en daardeur dit besit het volgens die woordskrywing in die betrokke Wet."

I assume that when the learned judge said that the appellant must have been aware of the presence of the tablets, he meant that the appellant, by inference, was

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aware. But the fact that he was the "huisbaas" would not, of itself, justify the inference that he was aware of the presence of the tablets. Furthermore, even if the circumstances were such as to justify the inference that he knew of the presence of the tablets, and lied about his knowledge, it would not necessarily follow that he had possession of them. Cf *Mkize's* case *supra* at 525B. The evidence of the appellant that he shared the room with Accused No 1 and that his employees had access to that room was, as already mentioned, not disputed. In the circumstances I do not consider that it is the only reasonable inference that he had possession of the tablets in any of the senses of the word as defined in the Act.

In my judgment the magistrate was correct in not finding that actual possession had been proved. He relied however upon the presumption contained in section 10(3) (as

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did the court a quo in the alternative). Counsel for the State wisely conceded that he could not rely upon the presence of the appellant in the bedroom after he had been summoned to the "hokkie" from where he had been standing with a group of other men in the back-yard. As Trollop JA pointed out in *S v Maiola* 1975(2) SA 727 (A) at 732C, the rationale for the operation of the presumption in section 10(3) is

"... that the drug or plant should be found so close and so circumstanced in relation to the accused that it suggests that he must have 'possessed' it, i.e., he was keeping or storing it or had it in his custody or under his control or supervision (see the definition of 'possess' in sec 1)."

It obviously follows that an artificially created proximity

such as when the accused is summoned by the police to the place where the drug is, cannot be relied on. See *S v Mweli*

1974(4) SA 259 (N), *S v Mulligan & Another* 1975(2) SA 111

(N) at 117A, *S v Mackay* 1975(4) SA 98 (N) at 101A and *S v*

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Pretorius 1982(2) PH H1 94. Nor does the presumption in section 10(3) of the Act apply when the drug is found in the immediate vicinity of where the accused had been at some earlier time. *S v Jogi* 1978(2) PH H239 at p347.

Counsel for the State sought to rely on the fact that the tablets must have been in "the passage when the appellant was in the back-yard of the premises. That is undoubtedly so but it does not assist him. The section requires that the drug should be found in the immediate vicinity of the accused. The finding of the drug and its then situation in the immediate vicinity of the accused must contemporaneously co-exist. This concept is conveyed by the words "found in the immediate vicinity of the accused" cf *S v Wilson* 1962(2) SA 619 (A) at 624A dealing with the presumption contained in section 90 bis (a) and (i) of Act No 13 of 1928 and *S v Jogi* supra. At the time when the

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tablets were found the appellant was no longer in the back-yard. At that time he was indeed in the bedroom and the wall had been dismantled so that it may be said that he was then in the immediate vicinity of the tablets, but he had been brought there by the police; for the reasons already

indicated his presence there cannot be relied on. Even if he had been present in the bedroom when the police arrived and had remained there until the tablets were found, I doubt whether on the facts it could have been said that they were found in his immediate vicinity. The tablets were not

found in the bedroom (nor, as the court a quo seems to have thought, in a hole in the wall of the bedroom); they were found outside the wall and buried in the ground. In S v

Mulligan supra at p 115E Fannin J says this:

"One factor which may affect the question is the one of the accessibility of the drug to the accused. For example, a man may be found sleeping in his bed, next to the outside wall of his bedroom. Dagga may be found hidden in a hollow or

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crevice on the other side of the wall, outside the house. It may in fact be only inches away from him, yet it would be difficult to hold that the dagga was found in his immediate vicinity.

No doubt many different such

situations may occur. In each case all the circumstances will have to be taken into account."

Nor do I think that the presumption would have operated if the police had found the tablets while the appellant was still standing outside in the yard. There is no evidence as to the distance between the back-yard and the passage. Assuming however (as it seems reasonable to do) that they were sufficiently close to say that the appellant was in the immediate vicinity, the State still faces the problem that at that stage (a) Accused No 1 who shared the bedroom with the appellant, was in the bedroom and much closer to the drugs than the appellant.

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(b) The drugs were in fact hidden in the ground outside the "hokkie", the walls of which were still intact.

(c) The appellant was, in any event, in the company of a number of others.

These factors, taken together, would militate against the application of the presumption. As Fannin J pointed out in S v Mulligan supra cit the onus is one which it may be extremely difficult to discharge in some situations and unless the trial court appreciates and makes allowance for the dilemma in which any who are in fact innocent may find themselves, serious injustices may result. (p115 in fin -116C).

In my judgment the State failed to prove beyond reasonable doubt the facts necessary to bring into operation-17-the presumption contained in section 10(3) of the Act.

The appeal accordingly succeeds and the conviction and sentence of the appellant are set aside.

A J MILNE Judge of Appeal

BOTHA JA JJ CONCUR NICHOLAS AJA]

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