

SOUTH AFRICA / JUDGMENT

S v Maritz (A273/2012) [2012] ZAGPJHC 237 (22 November 2012)

[2012] ZAGPJHC 237**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Kolbe, Willis

CASE / FILE NUMBER

A273/2012

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Source record**REPORTABLE****IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG****CASE**

NO : A273/2012JAP
: 2012/0232
DATE:22/11/2012

In the matter between: MARITZ,
QUINTON.....Appellant
And
THE
STATE.....Respondent

JUDGMENT**KOLBE AJ:**

The Appellant was convicted in the Regional Court on three counts of dealing in Methamphetamine in contravention of s 5(b) (dealing) of the Drugs and Drug Trafficking Act, Act No 140 of 1992 (the Drugs Act) and sentenced to 4 years' imprisonment on each count. The sentences were not ordered to run concurrently resulting in an effective sentence of 12 years' imprisonment.

The Appellant pleaded guilty to all three counts of dealing and was convicted on the strength of a written statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 (the CPA) prepared by his attorney (the plea explanation).

In the plea explanation the Appellant stated that on 15 December 2010 a certain tow truck driver approached his landlord, who in turn approached him, to buy Methamphetamine, an undesirable dependence – producing substance included in Part III of Schedule 2 of the Drugs Act (drugs) on behalf of the tow truck driver.

The Appellant further stated that he had been a user but had stopped approximately six months prior to 15 December 2010. He was given R300,00 as well as a car and sent to buy the drugs from his dealer which he later handed to his landlord. The same happened on 20 December 2010 (according to the documents attached to the record it would appear that the incident in fact occurred on 19 December 2010)¹ and 18 January 2011. On all three occasions he was requested to buy the drugs as part of a trapping operation ito s 252A of the CPA.²

The Appellant also admitted that he “...bought or dealt in drugs...”³ and that his conduct “...amounts to violation of the law...” An intention to deal was not unequivocally admitted and during his testimony in mitigation of sentence, the Appellant stated that at the time of the commission of the offences, he did not think that he was dealing. He thought that he was buying.

The Appellant now appeals against his convictions on the grounds that the regional magistrate could not reasonably have been satisfied that he was guilty of the offences to which he had pleaded guilty and ought to have recorded a plea of not guilty ito s 113 of the CPA, at the very least when the Appellant, during the sentencing proceedings, specifically denied that he had had the required mens rea in the sense of knowledge of unlawfulness.

It will be convenient to deal with what occurred during the Appellant’s testimony in mitigation of sentence first.

During evidence in chief the following exchange occurred:

“And you did not have permission to deal with drugs? – No I did not have permission to deal in drugs.

So by so doing, you knew that your conduct amounts to violation? – Yes I knew, but I did not think, you know at that time I did not think that I was dealing, I thought I was buying.

COURT: Mr, in the light of what the accused said, I need to consider 113.

MR NKABINDE: In fact, I wanted to clarify (inaudible).

COURT: Will you clarify?

MR NKABINDE: Yes it sounds like he is changing his plea now Your Worship.

COURT: Yes. You said to us you did not know what you were doing at that stage was wrong, correct? – Yes, I did not know it was dealing, but now I know it was dealing yes.

But then, at that stage, you did not know it was dealing? – I went and I bought and gave the oke, so yes, I knew it was dealing. Sorry.

No, no, you must be clear on this point. – Yes Your Honour, sorry Your Honour.

MR NKABINDE: Let me understand you, maybe it is a question of a (indistinct) that you are making this (inaudible). Your conduct itself, whether you were dealing or you were buying ... (intervenes) – Yes, yes.

Did you know that you were committing an offence? – Yes I knew I was committing an offence, yes.”⁴

Later the regional magistrate asked the following question:

“You assisted the police, as you testified, with the arrest worth R30 million? – Yes it is different laboratories.

Obviously different laboratories. – Yes, yes.

So you know the drug world better than any one of us? - The ?

The drug world. – World yes. Yes.

Would you agree with me? – Yes Your Honour.

And you know it is wrong and unlawful to buy and sell drugs? – Yes Your Honour.”

The reason for the reference to sell is unclear as there is no allegation in the charge sheet that the Appellant sold drugs, neither is there such an admission in the plea explanation.

During cross-examination it was also put to the Appellant that he was selling to other people which he denied. Instead of disallowing the question as it had neither been alleged nor admitted that he had sold drugs the regional magistrate followed through with the prosecutor’s cross – examination and asked the following question:

“COURT: You bought it and you supplied it. – They gave me, the truck driver gave me, the oke where I was renting, he gave him the money, then he called me because he knew I was using, so he asked me to go and buy from my dealer ... (intervenes)

And deliver – No the guy waited there by the house.

Yes, but then you gave it to him. – Yes I gave it to him.”⁵

It is clear that the regional magistrate’s questioning was aimed at eliciting a concession from the Appellant that his conduct amounted to dealing in respect of which he had had the required knowledge of unlawfulness.

Not only is a Court not competent to ask questions after conviction to justify a conviction⁶, but questioning of this nature is not even permissible at the plea stage, despite the inquisitorial nature of proceedings ito s 112 (1) (b) of the CPA . As stated in S v Williams⁷:

“It is irregular for a magistrate, regional magistrate or judge to subject an accused to critical questioning where the latter denies an element of the offence, or to ignore the denial and to attempt to convince the accused that such denial is improper or incorrect. See S v Jacobs 1978 (1) SA 1176 (C). The questioning in terms of s 112(1)(b) of the Act should be aimed at determining what the attitude of the accused towards the allegations in the charge-sheet is, and not at a determination of what it ought to be according to the view of the judicial officer.”

Whether this irregularity coupled with the failure to record a plea of not guilty, resulted in a failure of justice or an unfair trial, can only be determined after consideration of the whole record.⁸ “Each case must be determined according to its own circumstances and in its own context”⁹.

This brings me to the first ground of appeal namely that the regional magistrate, could not reasonably have been satisfied that the Appellant was guilty of the offences to which he had pleaded guilty as the facts admitted to by him were in conflict with his admission that he dealt in drugs.

It is trite that an admission of what is essentially a conclusion of law is insufficient¹⁰ to satisfy the requirements of s 112 (2) of the CPA, the relevant portion of which reads as follows:

‘If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement..... if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty.....’(Emphasis added).

Whether or not the Appellant’s admitted conclusion of law accords with the facts admitted to by him depends on the definition of dealing.

Deal in is defined in the Drugs Act as including “..... performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.”

Possess on the other hand is defined as including “.....to keep or to store the drug or to have it in custody or under control or supervision.”

In S v Solomon¹¹ it was held¹² that the conduct of a person acting as an agent on behalf of a purchaser for own use, does not necessarily constitute dealing as defined in Act 41 of 1971. The definitions of deal in and possess in Act 41 of 1977 were retained in the Drugs Act applicable in the instant matter¹³.

It was held in Solomon that the significant non - inclusion of words such as purchase or acquire in the definition of dealing ¹⁴ was an indication that the Legislator intended to treat a purchaser and a seller differently. Should a purchaser, solely by virtue of the extended meaning of dealing be guilty of dealing, the intended differentiation between sellers and dealers would disappear.

Once it is accepted that a purchaser for own use does not deal it follows that a purchaser for own use does not commit an act in connection with the supply or sale of a prohibited substance within the extended meaning of deal.¹⁵

Hence, it follows that the agent of the purchaser for own use, or the person who acts as such a purchaser's go-between does not commit an act in connection with the supply or sale of drugs by for instance handing the drugs to his principal.

The Appellant in this matter acted as an agent or a go-between for the truck driver who wished to buy drugs for his own use.¹⁶ He was evidently nothing more than the tow truck driver's socius criminis. As stated in Solomon¹⁷ it could not have been the intention of the Legislature to ascribe a different (and more serious) intention to the co – perpetrator or accomplice than to the main perpetrator of an offence.

Therefore, the Appellant's admission in the plea explanation that he dealt in drugs constitutes an incorrect conclusion of law on the facts admitted to by him. Having regard to the entire record, the regional

magistrate's failure to record a plea of not guilty to s 113 of the CPA, either at the plea or sentencing stage, resulted in a failure of justice and the convictions cannot stand.

S 312 of the CPA provides for situations where the trial Court ought to have recorded a plea of not guilty :

“(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.”

The provisions of s 312 of the CPA are of course not peremptory¹⁸ and an order should not be made in terms thereof if inappropriate in the circumstances of a particular matter. In *S v Mshengu*¹⁹ Jafta JA, (as he then was) said the following:

“[17] The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal. Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court. To construe s 312(1) in the manner that renders its provisions peremptory may result in an injustice or even an infringement of an accused person's right to a fair trial ... The court retains the discretion not to order a remittal if the circumstances of the case are such that the remittal will be inappropriate.”

In the instant matter the facts admitted to by the Appellant and accepted by the State as in accordance with the State's case,²⁰ can never sustain a conviction on a charge of dealing.

Once the State has accepted the factual basis for a plea of guilty, the State is bound by those facts and cannot go beyond them.²¹ A State's case based on different facts will in any event have no credibility. Therefore, it is clear that should the matter be remitted to the trial Court, there is no prospect of a conviction on charges of dealing.

The Appellant's factual admissions, in my view, amount to admissions to contraventions of s 4(b) of the Drugs Act (possession). The Appellant was however not charged with possession in the alternative. The only provision that can be of assistance is s 270 of the CPA which provides that :

"If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."

How this section should be applied was summarised as follows in *S v Tshali*²²:

"[13] The power conferred by this section was considered in S v Mbatha 1982 (2) SA 145 (N) in connection with a charge of contravening s 2(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres

Act 41 of 1971. It was held that it did not extend to convicting an accused so charged with a contravention of s 2(b) of that Act (ss 2(a) and 2(b) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 are similar to ss 5(b) and 4(b) of A the Act). Page J said at 147E: 'It is clear from the decisions to which I have referred, as also from the terms of the statute itself, that the elements of contravening s 2(b) are not necessarily included in the offence of contravening s 2(a) which can be committed without having to be in possession of the drug in question.' B This decision was cited with approval and followed in *S v Kuvare* 1992 (2) SACR 180 (Nm) in which Hannah J points out (at 182c) that the position may be different in a case where the charge specifically refers to possession, as in *S v Dikole* 1982 (4) SA 731 (NC) where the charge alleged that the accused had 'dagga in his possession for the purpose of C dealing therein' (see also *R v Moosa and Others* 1960 (3) SA 517 (A)). In those cases the description of the offence was held to be wide enough to contain all the elements of a contravention of (the equivalent of) s 4(b).

[14] In the present case the appellant was charged simpliciter with dealing; there is no reference to possession. The prosecution deliberately chose not to charge the appellant in the alternative with possession. That was an unfortunate choice because it is not now open to this Court to substitute a conviction of possession of dagga in contravention of s 4(b) of the Act".

The criticism of this judgment, expressed in Daniels, did not relate to the above mentioned conclusion, but to the Court's reliance on the reference to unconstitutional sections in the charges to find that the convictions could not stand, in particular the formulation of its reasons in this regard.²³

In the instant matter, the Appellant was, as in Ntshali simply charged with dealing. There is no reference to possession in the charge sheet.

Therefore, neither this Court nor the trial Court, should the matter be remitted, would be empowered to convict the Appellant of possession on the charges as framed.

It would furthermore not be procedurally permissible to add a further charge of possession, as evidence had been led albeit in respect of sentence. S 113 (2) of the CPA provides that:

“(2) If the court records a plea of not guilty under subsection (1) before

any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise”. (Emphasis added).

[39]] In S v Hendricks²⁴ the meaning of the words “.....before evidence has been led.....” as used in s 81(1) was considered and the Court

concluded that it referred to the “.....moment before evidence commences to be led” This section provides as follows:

‘Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge.....’.

[40] It is not without significance, that the qualifying words “....in respect of any particular charge....” used in s 81(1) of the CPA were omitted by the Legislator in s 113 (2). A plea of not guilty may ito s 113 of the CPA, be recorded as late as during the sentencing stage when evidence may have been led in mitigation or aggravation of sentence which is not strictly speaking evidence “in respect of any particular charge”.

[41] I am of the view that s 113 (2) of the CPA permits only the interpretation that, when evidence of whatever nature has been led, the prosecution shall proceed on the original charge. It is only when no evidence has been led, that the prosecutor may proceed on a charge, different from the original charge.

[42] It follows that nothing would be gained from remitting the matter. Proceeding on the original charge as framed will be futile and it is procedurally impermissible to add further charges.

[43] It was an unfortunate choice not to charge the Appellant in the alternative with possession or properly to formulate the charges according to the facts at the prosecutor’s disposal. The consequence is that the Appellant must be acquitted.

[44] By reason of the fact that the Appellant was in custody for approximately one year, no injustice will result from the fact that he cannot be charged again in respect of this offence²⁵.

[45] The result remains unsatisfactory and the manner in which the proceedings were conducted leaves us with a sense of unease. We note with displeasure and disquiet that:

[45.1] The preparation by the attorney representing the Appellant (not his present attorney) was clearly superficial. He advised the Appellant to plead guilty to dealing in spite of the Solomon decision, failed to appreciate the difference between buying and dealing, failed to pick up the wrong date on the charge sheet and failed to realise that the Appellant lacked the required mens rea to deal;

[45.2] It appears from the Petition that the Solomon decision was brought to the attention of the regional magistrate when leave to appeal was sought but he nevertheless refused leave to appeal;

[45.2] We were informed from the Bar that after leave to appeal had been granted by this Court, the regional magistrate refused to grant the Appellant bail pending his appeal. In circumstances where two judges of the High Court had articulated the prospects that he may have erred, his refusal to grant the Appellant bail is inexplicable; and

[45.3] A sloppy charge sheet resulted in the acquittal of a person who admitted to having committed an offence.

The following order is made:

The appeal is upheld and the convictions and sentences are set aside.

KOLBE AJ_____

I agree.

WILLIS J _____

Date of hearing: 19 November 2012

Date of judgment: 22 November 2012

J. O. Van Schalkwyk (attorney) for the Appellant

Instructed by D. H . Botha, Du Plessis & Kruger

P. Nel for Respondent

Instructed by Director of Public Prosecutions

1 Record, page 72

2 Although it was admitted that the trap was lawful, it is entirely unclear whether the tow truck driver and the Appellant's landlord were duly authorized agents but more importantly, why the Appellant was only arrested after the third request to purchase drugs.

3 Record p 36 lines 11-12

4 Record, page 41, lines 2-24

5 Record, page 43, lines 11-19

6 S v W & Others 1999 (2) SACR 640 (C).The case of S v Carter 2007 (2) SACR 415 (SCA) is distinguishable on the facts .The Court had to consider whether the fact that the plea explanation lacked factual admissions to underpin the charges to which the Appellants had pleaded guilty, an irregularity in the proceedings, resulted in a failure of justice in the context of that matter. It was held that evidence tendered after conviction had closed the lacunae in the plea explanation. This conclusion was reached in the context of evidence tendered during the sentencing stage that was not in conflict with admissions made in the plea explanation.

7 2008 (1) SACR 65 (C) [7]

8 See S v Daniels and Another 2012 (2) SACR 459 (SCA)

[12] – [16] and S v Keyser 2012 (2) SACR 437 [4]

9 S v Carter supra [35]

10 S v Zerky 2010 (1) SACR 460 (KZP) on 469 d [20]

11 1986 (3) SA 705 (A)

12 This was the unanimous decision of five judges after considering the conflicting judgments in the various Divisions. See S v Matamela 1977(1)SA 315 (T); S v Basthise 1982 (1) SA 976 (T); S v Gwabeni 1977 (2) SA 27 (OK); S v Adams 1986(3) 729 (CPD); S v Ntshingila 1980 (3) SA 883 (N); S v Watson 1979(2) SA 609 (O); S v Bester 1977(2) SA 141 (NK)

13 The Abuse of Dependence – Producing Substances and Rehabilitation Centres Act, Act No 41 of 1971 was on 30 April 1993, finally repealed and replaced by the Drugs and Drug Trafficking Act, Act 140 of 1992. A comparison of the relevant definitions in the two acts show that, save for a change in word order, the definitions are identical.

14 710 B - G

15 710 H – I

16 Small quantities were involved and there is no suggestion that it was bought for resale.

17 711 J – 712 E

18 See S v Carter supra.

19 2009 (2) SACR 316 SCA on 320 e – 322 d : See also 2009 (2) SACR 316 SCA on 320 e – 322 d; See also the approach in Carter supra

20 Record, page 37, lines 18-19 and page 38, lines 12-13

21 See : S v Moorcroft 1994 (1) SACR 317 (T)

22 2007 (2) SACR 23 (C) on 27 j – 28 d

23 S v Daniels supra [11]

24 1995 (2) SACR 177 (A)

25 See s 35 (3)(m) of The Constitution of the Republic of South Africa, Act No 108 of 1996

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