

SOUTH AFRICA / JUDGMENT

S v Mkulu (1773) [2018] ZAWCHC 91; 2018 (2) SACR 408 (WCC) (2 August 2018)

[2018] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

Rogers, Savage

CASE / FILE NUMBER

1773

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 1773

Clanwilliam Case No: 582/16

Magistrate's Serial No: 01/17

In the matter of:

THE STATE

and

NKABELO MKULU

Coram: ROGERS & SAVAGE JJ

Delivered: 2 AUGUST 2018

REVIEW JUDGMENT

Rogers J (Savage J concurring):

- [1] This matter comes before the court by way of automatic review. The accused, then aged 19, was charged in the Clanwilliam Magistrate's Court with dealing in 189 stops of dagga, alternatively with possessing the dagga. On 4 January 2017 he pleaded guilty on the main count. Following questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977, he was convicted and sentenced to a fine of R16 000 or 24 months' imprisonment of which R12 000 or 18 months'

imprisonment were suspended for five years.

[2] The record was timeously transmitted to this court where it was received on 26 January 2017. On the following day I directed the following query to the magistrate:

‘1. The accused was convicted of dealing in dagga. In the s 112(1)(b) questioning, he said he was sent by a friend on the farm to by the dagga and was transporting it for his friend. He said his friend

smoked dagga.

2 On what basis did you conclude that the accused’s answers constituted an admission that he had been dealing in dagga and not merely possessing it? See in this regard *S v Solomon* 1986 (3) SA 705 (A) and *S v Jackson ; S v Phillips* 1990 (2) SACR 505 (E).

3. Did you rely on the presumption in s 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992? If so:

(a) Was the accused’s attention drawn to this presumption?

(b) Is it permissible to rely on this presumption at the s 112(1)(b) stage, particularly if the accused’s answers indicate prima facie that he is not admitting to having dealt in, rather than merely possessed, the dagga?’

[3] A year and a half later, on 27 June 2018, the file and the magistrate’s reply (dated 31 May 2018) were returned to this court. This delay should long since have been noticed and queried by this court. Unfortunately, because I was on long leave in the second term of 2017 and acted in the Supreme Court of Appeal in the third and fourth terms of 2017 and in the first and second terms of 2018, I failed to realise that this matter was outstanding. Although the administrative staff of this court should have pursued it, the primary responsibility for the gross delay rests with the magistrate. The duty of lower courts in this regard was recently emphasised by this court in *S v Jacobs & six similar cases* 2017

(2) SACR 546 (WCC). Judgment in that matter was delivered on 26 August 2017. It is safe to assume that it became widely available to magistrates shortly thereafter.

[4] In the present case, all the magistrate says by way of explanation is that when my query was returned to her office she ‘was simply swamped with work, having taken over as Head of Office and having to mentor a colleague who had taken over in the criminal courts’. This is unacceptable. If a magistrate does not have adequate resources, she should take it up with her superiors. I have sympathy with overloaded magistrates but they cannot be supine in the face of a workload beyond their reasonable capacities. There should at least be a paper trail showing the magistrate’s endeavours to obtain assistance from her superiors. This allows responsibility for the violation of justice to be traced. Nothing of that kind exists here.

- [5] On the merits of my query, the magistrate stated that she did not rely on the statutory presumption. She drew my attention to the fact that the presumption has been declared invalid by the Constitutional Court.
- [6] The magistrate then referred to the statutory definition of ‘to deal’ as including ‘performing any act in connection with the trans-shipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation’ of drugs. She stated that in the questioning the accused admitted that he had “collected (purchased), supplied and transported’ the dagga. Citing *S v Adams* 1986 (3) SA 733 (C), she submitted that the accused’s actions included the elements of both ‘verskaffing’ and ‘verkryging’.
- [7] The magistrate’s reference to *Adams* is erroneous. The passage she cites is to be found in the *Solomon* case mentioned in my query (which, by the way, overruled *Adams* on the point here relevant). In my view, however, the magistrate, has misunderstood the *Solomon* case and the conclusion expressed at 712J-713A. In *Solomon Smalberger JA* distinguished between acts associated with the supply of drugs and acts limited to the acquisition of drugs for personal use. Despite the wide language of the definition ‘deal in’, the learned judge of appeal held that a person who buys drugs for personal use is not performing an act ‘in connection with’ the ‘supply’ or ‘sale’ of the drugs. Although not specifically mentioned, the same must apply to the concept of ‘collection’ and ‘transmission’ of drugs. A person who buys drugs for personal use will inevitably ‘collect’ (ie take delivery of) the drugs; and unless he uses the drugs there and then at the premises of the supplier, he will also inevitably transport the drugs, whether by walking with them on his person or by taking it in a vehicle to the place of consumption. In the case of a personal user, none of these acts fall within the definition ‘deal in’.
- [8] It was further held in *Solomon* that, if this is so in relation to the personal user, it is also so in relation to a person who is merely acting as an agent of the user without any separate role in the supply of the drugs. *Smalberger JA*’s conclusion, and his application of the correct approach to the facts of that particular case, appear from the following passage (713B-E):

‘Elke geval moet natuurlik volgens sy eie feite beoordeel word. In die geval waar ’n tussenganger of agent betrokke is, is dit gevolglik belangrik dat die feite van die bepaalde geval vasgestel word alvorens daar oorgegaan word tot die volgende stap, naamlik, om te bepaal of daardie feite daarop dui dat die tussenganger of agent se handeling betrekking het op die verkryging of verskaffing van verbode stof. In sekere gevalle sal dit duidelik wees in welke kategorie die handeling van die tussenganger of agent val. In ander gevalle kan dit moeilike probleme oplewer.

In die onderhawige geval het die appellant, soos reeds aangetoon, op versoek van ’n voornemende koper, sonder enige vergoeding of voordeel vir homself, en bloot om die koper ’n guns te bewys, ’n Mandrax tablet gaan koop by ’n persoon wat deur die koper aan hom uitgewys is. Die geld vir die aankoop van die tablet is deur die koper voorsien, en die tablet was klaarblyklik vir die koper se eie gebruik bestem. Die appellant het geen handeling verrig wat die

koper nie self kon verrig het nie. Sy betrokkenheid het net by die koper gelê, en hy het bloot as verlengstuk van die koper opgetree. Sy optrede was gerig op die ontvangs van verbode stof, en nie om die verskaffing of verspreiding van verbode stof te bevorder nie.

[9] In the present case, the questioning of the accused did not reveal a role going beyond that of the accused in Solomon or in the other case to which I referred the magistrate, *S v Jackson*; *S v Phillips*. The importance of thorough s 112(1)(b) questioning in such cases is apparent from *S v Naidoo* 1989 (2) SA 114 (A). The accused there had stated, in answer to s 112(1)(b) questioning, that three men came to him, asking for dagga and mandrax for use. The accused went to someone and bought the drugs, went back to the three men, gave them the drugs and was repaid the amount he had paid to the supplier.

[10] That would seem to have been a stronger case for dealing than the present one yet Botha JA held that the accused's answers did not without more justify a conviction for dealing. After referring to the very passage in Solomon cited by the magistrate in the present case, the learned judge of appeal continued (119I-120H):

'If this approach is followed in the present case, it is manifest that the appellant's explanation falls far short of complying with the important requirement that all the facts pertaining to the transaction must be established before it can be determined whether

the appellant's conduct constituted activities relating to the supply of the drugs, or to the acquisition of them, or to both. Essentially, the appellant's explanation reveals no more than the following: he was asked by the recipients for dagga and Mandrax 'to use', which denotes, *prima facie*, consumption by the recipients themselves; he went off and bought the drugs from the supplier, paying for them with his own money; and he returned to the recipients, handed over the drugs to them, and asked for payment of the money he had expended. Wholly unexplored areas of uncertainty relating to the precise nature of the transaction, which cry out for further enquiry, include the following: What was the relationship, if any, between the supplier and the appellant? Was the supplier known as such to the appellant? Did the appellant go off to buy the drugs on his own initiative, or was he directed or requested by the recipients to do so? Did the recipients know the supplier as such? Did they request the appellant to go to the supplier for the purpose of obtaining the drugs for them? Did the recipients undertake to refund to the appellant the money that he would spend in buying the drugs? And, did the appellant receive, or was he to receive, any remuneration for what he had done, either from the supplier or from the recipients?

The lacunae in the appellant's explanation can be demonstrated by postulating and contrasting two possible scenarios. Possibility (a) : the appellant was acting as a runner for the supplier; the recipients did not know the supplier; the transaction would not have taken place but for the intervention of the appellant; and the appellant would have earned a commission from the supplier, had the transaction been carried through. Possibility (b) : the supplier was known to the recipients, but not to the appellant; the recipients asked the appellant, purely as a favour, to obtain the drugs for them from the supplier; the recipients directed the appellant where to find the supplier; it was arranged that the recipients would refund to the appellant the money that was

required to buy the drugs; and the appellant would have derived no advantage from the transaction.

On possibility (a) the appellant would have contravened s 2(a), but on possibility (b) plainly not. In the latter case he would have been no more than a mere conduit for the acquisition of the drugs by the recipients and he would not have been involved in any activity related to the supply of the drugs (see Solomon's case *supra* at 713D - F). The decisive question is not whether the appellant was acting as the agent of the recipients, as may have been suggested

in the judgment of the Court *a quo* on the application for leave to appeal, for in certain circumstances an agent for the buyer may be participating himself in activities which are related to the supply of drugs (cf *S v Williams and Others* 1987 (3) SA 126 (E) at 130G - I). But on the facts postulated in possibility (b) the appellant would not have been doing anything that the recipients could not have done themselves; as a mere conduit for the recipients his conduct was directed at the acquisition of the drugs and not at their supply.'

[11] The accused was thus wrongly convicted of dealing in cannabis. The questioning showed that he could competently have been convicted of possession. We do not know whether the prosecutor would have accepted a plea of guilty on the alternative count. Ordinarily the proper course would be to correct the proceedings by setting aside the conviction and remitting the matter to be dealt with on the basis of a plea of not guilty to the main count but of guilty to the alternative count.

[12] However, given the gross delay that there has been in finalising the case, justice requires that we should finally dispose of it by substituting a conviction for possession and imposing a suitable punishment. The file indicates that the accused paid the unsuspended portion of the fine on 4 January 2017. Fortunately, therefore, the injustice perpetrated by his conviction for dealing can be reversed.

[13] The accused was 19 years old at the time of the offence. He had no previous convictions. According to the questioning, his role was that of an agent to buy and deliver dagga for personal use to a friend. The quantity of dagga was reasonably substantial (189 stops – about 848 grams). In my view, an appropriate punishment would be a wholly suspended fine of R4000, failing payment of which imprisonment of six months.

[14] The following order is made:

(a) The conviction and sentence of 4 January 2017 are set aside and replaced with the following:

(i) The accused is convicted on the alternative count of possession of cannabis.

(ii) The accused is sentenced to a fine of R4000, failing payment of which imprisonment of six months, wholly suspended for a period of five years on condition that the accused is not convicted of a contravention of s 4(b) or s 5(b) of Act 140 of 1992 committed during the period of suspension.

- (ii) The sentence is antedated to 4 January 2017.
- (b) The State is directed, within two weeks of this order, to repay to the accused the amount of R4000, being the fine paid by him on 4 January 2017.
- (c) A copy of this judgment shall be sent to the director-general of the Department of Justice, the regional court president (Western Cape) and the Magistrates' Commission for consideration of such action as may be considered appropriate, in relation to the Clanwilliam Magistrate's Court, having regard to the judgment and orders made in *S v Jacobs & six similar cases* 2017 (2) SACR 546 (WCC).

ROGERS J

SAVAGE J

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