REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/11/2021 .....

CASE NO: A126/2020

In the matter between:

XHOSA PATSON PULE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

CORAM: MANOIM J
THUPAATLASE AJ

INTRODUCTION

[1] In this matter, the Appellant was charged in the Regional Court as follows: on the Main count of dealing in dangerous dependence-producing substance in contravention of the provisions of Section 5(b) read with Sections 1, 13(f), 17(e), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992, in that on or about 23rd January 2018 and at or near Honeydew Shopping complex in the Regional Division of Roodeport he did wrongfully and unlawfully deal in dangerous dependence-producing substance to wit 26 000 mandrax tablets. The charges were read with Section 51(2) of the Criminal Law Amendment Act 1997.

[2] In the alternative the accused was charged with contravening Section 4(b) read with Sections 1, 13(d), 17(d), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992 (the Act) for unlawful possession of drugs (mandrax tablets) in that on or about 23rd January 2018 and at or near Honeydew in the Regional Division the accused did wrongfully and unlawfully possess dangerous dependence-producing substance to wit 26 000 mandrax tablets.

[3] The Appellant who was legally represented throughout the trial, pleaded not guilty to the main count but pleaded guilty to the alternative count of possession of mandrax tablets. The statement in terms of Section 112(2) was prepared and in the statement the Appellant admitted all the elements of the offence in the alternative count. The State did not accept the plea of the Appellant on the alternative count and the matter proceeded to trial on the main count with the State seeking to proof that the Appellant was dealing in drugs as contemplated by Section 5(b) of the Act.

[4] The Appellant was subsequently convicted on the main count of contravening the provisions of Section 5(b) and was sentenced to 15-years' imprisonment term. The Appellant appeals against both conviction and sentence.

[5] The leave to appeal against both conviction and sentence was granted by the learned regional court magistrate. In respect of appeal on conviction the Appellant argued that the learned regional court magistrate erred in admitting the State evidence tendered by the only witness called to testify namely Lieutenant Colonel Jacobs.

[6] It is the contention of the Appellant that such evidence was inadmissible by virtue of the provisions of Section 252A of Criminal Procedure Act No. 51 of 1977 as amended (CPA). This section provides various procedural protections to accused persons in respect of traps and undercover operations where the conduct of the police goes beyond providing an opportunity to commit an offence.

[7] The Appellant's argument is that the conduct of the police officer who arrested him had gone beyond the provision of an opportunity to commit a crime and that evidence should have been ruled inadmissible. It was further contended that the use and reliance on such evidence to convict the Appellant has resulted in the Appellant not receiving the fair trial to which he is constitutionally entitled.

[8] It was the argument of the Appellant that the learned regional court magistrate should have applied the provisions of Section 252 A (2) of the Criminal Procedure Act[1] which lists factors the court should take into consideration when assessing the admissibility of the such evidence. It was argued that a trial-within-trial should have been conducted in order for the court to make a determination as to the admissibility such evidence.

[9] In respect of sentence it was argued that the learned regional court magistrate erred in concluding that there were no compelling and substantial factors specifically with regard to the length of the pre-sentence incarceration that the Appellant endured until sentence; remorse shown by the Appellant by pleading guilty on the alternative count of possession of drugs. These factors the argument goes should have been to constitute substantial and compelling factors to justify a deviation from imposing minimum sentence.

[10] It was further submitted that the learned regional magistrate over-emphasized the seriousness of the offence and interests of society at the expense of personal circumstances of the Appellant and that given the age of the Appellant the sentence induces a sense of shock.

[1] Act No. 51 of 1977 as amended

EVIDENCE

[11] The State adduced the evidence of Lieutenant-Colonel Jacobs. He was the only witness called by the State. He explained how the events that lead to the arrest on the Appellant unfolded on the day in question. As it appears from the uncontested evidence a plan was devised to meet Appellant with a view of exploring the possibility of buying drugs from him, however on that day the plan was for a "meet and greet" with the Appellant. The meeting was arranged by a police informer. There were also other police officials who were stationed in the precinct of Honeydew shopping complex and were keeping observation. These officers were given a pre-arranged signal which Lieutenant-Colonel Jacob would use in the event that he was in distress or was compromised.

[12] The plan went as arranged and the police informer drove him to the arranged meeting place which was in the vicinity of a McDonald's restaurant in the Honeydew shopping complex. Lieutenant- Colonel Jacobs testified that upon the arrival of the Appellant he got out of the vehicle with the informer and went to meet the Appellant. The Appellant asked him to get in his car leaving the informer behind. Once in the Appellant's vehicle, the Appellant drove him to a nearby car wash in the same complex. They were discussing the future business he wanted to do with the Appellant; the Appellant stopped the vehicle and got out and went towards the boot of his car and invited Jacobs to come and see the drugs he had with him. He even commented on the quality of drugs.

[13] He further informed Jacobs that he was on his way to deliver some 20 packets to a client. It was at that stage the plan that Jacobs initially had in mind changed and he decided to effect arrest of the Appellant. According to Jacobs this was prompted by a realisation that if the large quantity of drugs that the Appellant had in his possession for distribution could be allowed on to the streets it would have a negative societal impact. He therefore felt duty bound as a law enforcement to effect arrest.

[14] Jacobs then activated the signal to the other police officers who were keeping observation and the Appellant was arrested. The scene was taken over by the investigating officer and the Appellant was taken to Honeydew police station where he was charged.

[15] In cross-examination Jacobs admitted that he had no money with him on that day as it was not his intention to buy drugs. He reiterated that his intention was to arrange for a deal in the future.

[16] During cross-examination Jacobs denied that the Appellant was trapped. He indicated that there was no need to obtain the authorisation of DPP at that initial stage of the investigation and that he had scant information. After the conclusion of cross-examination by the defence the State closed its case. The Appellant also closed his case without testifying.

ANALYSIS

[17] The learned regional court concluded that Jacobs gave satisfactory evidence and also concluded that although the undercover operation was established there was no incentive provided by the police to commit a crime. As stated earlier the Appellant didn't testify.

[18] The learned regional magistrate concluded that Mr Jacobs was an excellent witness and there were no justifiable grounds to reject his evidence. A corollary is that the court proceeded to believe him regarding the nature of the operation on that day which was not to buy any drugs from the Appellant.

[18] The Appellant didn't testify though he initially pleaded guilty to the commission of the offence on the alternative count. He offered the explanation that he was doing that so that he could continue in assisting his brother, who was held in a correctional centre, with legal fees.

LAW

[19] In order to succeed this Court must be satisfied that the learned regional magistrate was wrong in concluding that on the admitted evidence the guilt of the Appellant has been proved beyond a reasonable doubt. The corollary question for determination is therefore whether in the light of the evidence and probative material which were adduced during trial; the guilt of the Appellant was established beyond reasonable doubt.

[20] The approach of the court sitting as court of appeal was succinctly put as follows in the case of ***State versus Hadebe and Other***[2];

> *"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against the finding of fact. In short in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".*

[21] In doing so, due regard had to be given to the fact that the learned regional magistrate had the decided advantage of observing the witness in court when the witness was giving evidence. It is trite law that the court sitting as court of appeal will defer to the finding of the trial court in respect of credibility.

[22] I have looked in vain for any misdirection that it can be argued is evident from the analysis of evidence by the learned regional court magistrate and have found none. It is my conclusion therefore that the evidence adduced at the trial was fairly and accurately summarized. I am therefore satisfied as was the trial court that there is nothing on record on which the State evidence can be faulted. Nor was there any suggestion of this from the defence during cross-examination.

[23] The important factor in this case is whether the evidence that was used to convict the Appellant was admissible. It is always important to remember that 'the Constitution proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity'[3].

[24] In order to give effect to this ideal the legislature promulgated Section 252 A[4] – the section regulates the admissibility of evidence obtained through entrapment, under-cover operations and related matters. Since its promulgation Section 252A has

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[2] 1997 (2) SACR 642 SCA at 645e-f

[3] *The State versus Mabena* [2006] SCA 132 (RSA) at para. 2 per Nugent JA (as then was)

[4] Per Criminal Procedure Second Amendment Act 85 of 1996. The Section came into effect on 29/11/1996

been a subject of much legal and academic debate. And much of the debate has been around its true interpretation.

[25] The Supreme Court of Appeal in ***State v Kotze*** [5]distinguished between a trap and undercover operation, holding that the latter may not necessarily involve a trap. The Supreme Court of Appeal has therefore held that it is incorrect to understand section 252A as only authorising traps in certain circumstances.

[26] The crisp legal issue for determination by this court is whether the learned regional court magistrate was correct in concluding that because the police conduct didn't go beyond providing an opportunity to commit an offence, then the provisions of Section 252A (2) which decree such evidence admissible to be applicable.

[27] On the other hand the Appellant contends that the conduct went beyond the providing of opportunity to commit an offence and therefore such evidence ought to be admitted subject Section 252A (3). That a trial –within- trial should have been held.

[28] It is a requirement of the law and Section 252A (3) that a jurisdictional foundation be laid in order to allow for a trial-within- trial. The only issue regarding the arrest of the Appellant regarding a trap was raised by way of cross-examination in the context of Section 252A (4) in terms of which the DPP may issue authorisation for the conduct of an undercover operation. The Subsection confers the discretion on the DPP. See the case ***State versus Makhana***[6].

[29] This court agrees with the factual and legal conclusions of the learned regional court magistrate. I shall proceed to illustrative by way of example how the regional court dealt with the facts and the law that was presented to the court. The learned regional court magistrate was alive to the procedural safeguards the Appellant enjoyed. The onus that rests on the State to proof the guilt of the accused beyond reasonable doubt. The court was cognisant of the fact that there were admissions regarding possession of drugs. The evidential material of such admissions were also given due weight.

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[5] 2010 SACR 104 SCA at

[6] 2002 (3) SA 2001 (N) at 205A-D

[30] The court further dealt with a further procedural safe-guard that it needed to be aware of when dealing with an accused person e.g. the presumption of innocence and the right to remain silent and not testify.

[31] The Appellant had sufficient time and legal entitlement to challenge the admissibility of the evidence of Lieutenant Colonel Jacobs. That entitlement is located in Section 256 A (6). In terms of the Subsection the Appellant had a procedural duty to state the basis upon which the admissibility of the evidence which had been obtained during undercover operation is being challenged. The legal representation raised the issue of the authorisation by DPP and it was explained to him that the police didn't deem it necessary to obtain such authorisation as they were still in the initial and nascent stage of their investigation. It is interesting to note that the legal representative of the Appellant on appeal didn't pursue the matter any further. It can only be concluded that he accepted the explanation given by the State witness.

[32] The trial court concluded that the law recognises that law enforcement officers, State employees and their agents may engage in an undercover operation in order to detect, investigate or uncover the commission of an offence. This was confirmed by the evidence of Lieutenant-Colonel Jacobs when he that testified that information had been received that there was an offence being committed by the Appellant with the intention to even expanding the drug trade to other provinces in what was dubbed wholesaling. The reasoning of the trial court in reaching this conclusion cannot be faulted.

[33] In addition when the arrest was effected the Appellant was involved in a commission of an offence. He offered drugs to the Appellant and this was done without any form of encouragement from the side of the police.

[34] As correctly stated by the learned regional court magistrate ***State versus Kotze*** has recognised a distinction that, whilst the Section deals with both trap and undercover operations – there are instances where undercover operation may involve no element of a trap. The learned regional court concluded that this was the case in this matter and therefore admitted the evidence as permitted by Section 252A (1). The court made a definitive finding that this was classic case of an undercover operation.

[35] It was held in ***Kotze***[7] that the starting point for determining the admissibility of evidence was s 252A (1) of the Act. In this regard Sub-section (1) excludes the possibility of a defence of entrapment by explicitly stating that the use of a trap or engaging in undercover operations in order to detect investigate or uncover the commission of an offence is permissible. The sub-section only provides a procedural guard to the accused person where the conduct goes beyond providing an opportunity to commit an offence.

[36] As stated earlier in the judgment the issue of the admissibility of evidence was dealt with in a perfunctory manner by the legal representative of the Appellant. The witness was asked about whether an authorization for a trap and or an undercover operation was obtained from DPP. It was then explained by Lieutenant- Colonel Jacobs that as the investigating team they discussed the matter and concluded that the stage was not yet ripe to apply for such authorization. The legal representative didn't pursue the matter any further; giving a distinct impression that the answer given was satisfactory.

[37] The cursory manner the issue of admissibility was dealt with didn't assist the Appellant especially in view of what the SCA said in the case of ***Kotze*** that;

> *"it is important for the presiding officers faced with the challenge to the admissibility of the evidence of a trap to be aware of and apply ss(6) in terms of which the accused must furnish the grounds on which the admissibility of the evidence is challenged*[8]*"*

Conclusion Ad Conviction

[38] In conclusion the court accepts the reasoning of the learned magistrate and the manner in which the evidence was characterised and dealt by the court. Absence of

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[7] Kotze Para. 21 which states that "any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)."

[8] *Kotze* at para.19

authorisation from the DPP didn't affect the fairness of the trial. As was held in the case of ***State versus Zurich***[9]***;***

> *"traps, by their very nature, always involve misrepresentations specifically intended to deceive the suspect. In terms of s 252A the uncovering of an offence by way of such a misrepresentation is not improper and if it goes no further than to create an opportunity to commit an offence and does not affect the admissibility of the evidence obtained as a result."*

[39] In the end I am not persuaded that the conduct of Jacobs went beyond providing an opportunity to the Appellant to commit a crime. The Appellant was the person using the officer as a conduit to commit a crime of dealing in drugs. The officer didn't play an active role leading to the arrest of the accused. As he testified and which testimony was not gainsaid; the meeting on the day of the arrest of the Appellant was an introductory meeting. It is the Appellant who took the initiative and showed the drugs and even indicated he was going to deliver the drugs to some of his client.

I am satisfied that the evidence tendered by the State was admissible and that conviction is hereby confirmed.

Ad SENTENCE

40] The Appellant was sentenced to 15 years' imprisonment. The approach of this court to interfering with sentence of the trial court has been encapsulated in numerous decisions. In the case of ***State versus Linus"***[10] it was stated as follows regarding approach to sentence for drugs;

> *"the offence of which the Appellant has been convicted of is very serious nature. It indeed has a devastating effect on the communities. It destroys the youth and frustrates parents; its consumption leads to dysfunctional families and disrupts proper schooling. It is a source of many ills on our societies"*

[9] 2010 SACR 171 SCA at para 11
[10] 2015 (1) SACR 381 (G) at para. 6

[41] The Appellant has argued that the sentence imposed induces a sense of shock and that the learned regional court magistrate over-emphasized the interests of society and didn't take into account the personal circumstances of the Appellant in particular his age. It further argued the court didn't give due consideration to the period that the Appellant spent in custody during trial.

[42] A court sitting on appeal cannot interfere with the discretionary function of the lower court unless the sentence imposed is unjust or unless there has been a gross misdirection. I have read the judgment of the court a quo. I am satisfied that the court took into consideration all mitigating factors that were placed before it. In ***State v Moswathupa***[11] it was held that sentencing is pre-eminently a matter for the discretion of the trial court. In ***State v Salzwedel and Others***[12], the court held that an appeal court can only interfere with the sentence of the trial if the court misdirected itself or the sentence was shockingly inappropriate.

[43] In ***State v Malgas***[13] the SCA dealing with the minimum sentence legislation, said that when considering sentence, the emphasis must shift to the objective gravity of the type of crime and the public's need for effective sanctions against it.

[44] In the present matter the charge-sheet made reference to the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997and Part II of Schedule 2 to that Act (the minimum sentence legislation). The provisions provide that for a contravention of s 5*(b)* of the Act a minimum sentence of 15 years' imprisonment must be imposed on a first offender if it is proved that the value of the dependence-producing substance in question is more than R50 000. The trial court accepted the uncontested evidence of Lieutenant Colonel Jacobs that the street of value of 26 000 mandrax found in the boot of the Appellant was more than R 50 000.00.

1. The appeal in respect of sentence is dismissed.

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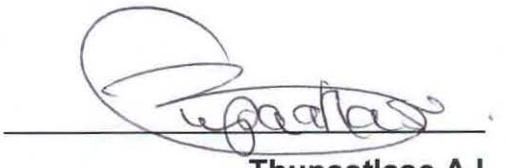
[11] 2012 (1) SACR 259 (SCA[11]) at page 261 par 4
[12] 1999(2) SACR (SCA) at pages 586a- 588b
[13] 2001 SACR 469 SCA



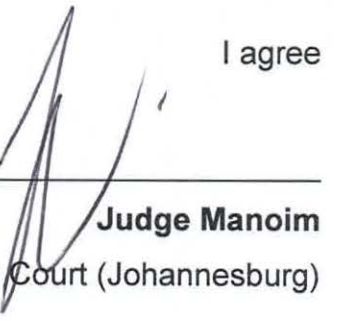
Thupaatlase AJ

Acting Judge: Gauteng Division of High (Johannesburg)

Heard on 05 October 2021

Delivered on 12 November 2021

I agree



Judge Manoim

Judge: Gauteng Division of High Court (Johannesburg)