IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR100/18

In the matter between:

BRENTON FRANK APPELLANT

and

THE STATE RESPONDENT

Coram : Poyo Dlwati *et* Bezuidenhout JJ
Heard : 15 March 2019
Delivered : 7 June 2019

ORDER

On Appeal from the Regional Court, sitting in Pietermaritzburg (sitting as the court *a quo*):

(a) The conviction and sentence of the appellant is set aside on the ground that the provisions of section 113 of the Criminal Procedure Act 51 of 1977 ought to have been applied;

(b) the matter is remitted back to the Regional Court for the court to act in terms of section 113 of the Act.

JUDGMENT

Poyo Dlwati J:

[1] Consequent upon a plea of guilty, the appellant was convicted of two counts of dealing in cocaine in the Regional Court, sitting in Pietermaritzburg, on 15 October 2015. On 29 November 2017, he was sentenced to 6 years imprisonment. Leave to appeal against both conviction and sentence was refused by the court *a quo*. The appellant successfully petitioned this court for leave to appeal against both his conviction and sentence.

[2] The facts upon which the appellant was convicted were briefly as follows: in his statement made in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the Act) the appellant averred that on 17 July 2014 he unlawfully dealt with a dangerous dependence producing substance weighing 2.38 grams. He had been contacted by a buyer only known to him as Joe who later turned out to be a police agent. The appellant met Joe at Monty's Garage in Ortman Road in Pietermaritzburg. He handed Joe five packets of drugs and received from him R1 800 which was the price that had been agreed on for the drugs. He admitted that by doing so he was in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, read with s 1, 13(f), 17(e), 19 and 64 of the same Act. The second count was also similar to the first except that it happened on 12 August 2014 and on this occasion eleven plastic sachets were handed to Joe in exchange for R3 000.

[3] Upon questioning by the learned magistrate on whether the appellant understood the contents of the statement, his response was in the affirmative. He

also confirmed that he agreed with everything that was in the statement and that it was made by him voluntarily. The State accepted the facts in the appellant's statement as being in accordance with the State's case. The learned magistrate returned a verdict of guilty based mainly on the statement made by the appellant. I will revert later in the judgment with the details of the appellant's s 112(2) statement. There were enormous delays prior to the sentencing of the appellant. On one of those occasions, and after the appellant had changed his legal representatives, and this was during the sentencing proceedings, there was a considerable delay in securing the attendance of a doctor in order to deal with the appellant's health in mitigation of sentence.

[4] On 9 November 2017, Mr Chetty, being the appellant's new legal representative, appeared on his behalf and applied for an adjournment which was vehemently opposed by the State. This was understandably so as the appellant had been convicted as long ago as 15 October 2015. During that application, Mr Chetty submitted that he needed the adjournment to properly consider the appellant's matter as he, for instance, during the short time that he had, had perused the plea and had problems with it as it did not say that it was cocaine that was in those plastic sachets and that there was no confirmation that it had been tested. In his view, the appellant had not admitted one of the elements of the offence and the court ought to have entered a plea of not guilty. The matter was then adjourned on that occasion to 27 November 2017 to allow Mr Chetty to familiarise himself with the matter and be able to deal with it effectively in the future.

[5] On 27 November 2017, the matter was again adjourned to 29 November 2017 as the doctor was not available. On 29 November 2017, Mr *Barnard*, on behalf of the appellant, made an application that a plea of not guilty be entered, as there was a special defence available to the appellant as provided for in s

252A of the Act. Mr *Barnard* submitted that as the appellant had not stated in his plea explanation that the transaction did not go beyond the boundaries that were referred to in subsection (3) of s 252A, the court ought to have satisfied itself that the special defence did not apply in this matter. As this was not done a plea of not guilty ought to have been entered. This application was refused by the learned magistrate. The appellant was then sentenced and hence this appeal.

[6] In argument before this court, Mr *Barnard* submitted that as the charges against the appellant were as a result of an entrapment engineered by the police, it ought to have been evident on the record that the provisions of s 252A had been complied with, namely that the court ought to have been satisfied that the basis of the admissibility of such evidence had been established beyond a reasonable doubt. As this had been brought to the attention of the learned magistrate, so went the submission, he ought to have entered a plea of not guilty as he had no discretion in the matter. Mr *Barnard* further argued that the provisions of s 113(1) of the Act were peremptory in this regard and ought to have been complied with. In support of his submission, he made reference to various case law. It was therefore argued that the matter ought to be remitted back to the Regional Court for compliance with the provisions of the Act.

[7] Section 113(1) of the Act provides that

'If the court at any stage of the proceedings under section 112 (1) (*a*) or (*b*) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the

accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

[8] Section 252A(1) of the Act on the other hand provides 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).'

Subsection (3) provides that the court may refuse to allow evidence of an entrapment if it is of the view that the trap went beyond providing an opportunity to commit such an offence.

[9] During the trial, the appellant pleaded guilty to the charges proffered against him. He was legally represented throughout those proceedings. When asked by the learned magistrate whether he understood the contents of the statement he agreed. He further advised the court that he agreed to all the contents of the statement and confirmed its correctness and truthfulness of the statement. Furthermore, in his evidence during mitigation of sentence, the appellant conceded that he admitted in his plea that during the police traps he was found selling small quantities of cocaine. He further explained that he was sorry for having cocaine, hence he pleaded guilty.

[10] Perhaps it is apposite at this stage to refer to his s 112(2) statement tendered during the trial. It read as follows:

'I the undersigned Brenton Frank, do hereby state as follows:

1. I make this statement freely and voluntary, and confirm that I have taken independent legal advice on this matter.

2. I make this statement voluntarily and have in no way been induced to make this statement.

3. I am aware that I have the right to remain silent, and I have the option to plead not guilty.

4. I am aware that I have been charged with two counts of dealing in a dependence producing substance, in terms of count 1 and count 3 of the current charges contained in the charge sheet.

5. I hereby plead guilty to count 1 in that on or about 17th July 2014, at or near Monty's Garage, Pietermaritzburg, I did unlawfully deal in a dangerous dependence producing substance to wit 2.38 grams, contained in 5 plastic sachets.

6. The facts of the offence are as follows:

6.1 I was contacted by the buyer known to me as Joe.

6.2 I then met the buyer, who I now know was a police agent known to me as Joe.

6.3 I met him at Monty's Garage, Ortman Road, Pietermaritzburg.

6.4 I then handed him the 5 packets and received from him R1 800, being the agreed price for the drugs.

7. By doing so I admit having been in contravention of section 5(b) of Act 140 of 1992, read with section 1, 13(f), 17(e), 19 and 64, of the same Act.

8. I admit and confirm that at all material times, I acted unlawfully and knew that I was committing the criminal offence of dealing in a dependence producing substance [and it was found to be cocaine][1] analysed and confirmed to be cocaine with full knowledge of my unlawful actions.

9. I also plead guilty on count 3'.[2]

The plea for count 3 is similar to the plea made in respect of count 1 save for the dates and the amount of drugs and money.

[11] Whilst it was raised for the first time after almost a year after the appellant was convicted that a plea of not guilty ought to have been entered as he had not admitted to all the elements of the offence, I disagree. On closer examination of the appellant's statement in terms of s 112(2), it was premised by the admission and acknowledgment that he had taken independent legal

[1] This was handwritten and initialled into the s 112 (2) plea statement.
[2] Pages 176 – 177 of the Record.

advice on the matter. This was from the private counsel of his choice and one must assume that the appellant had the necessary confidence in him. This would have a laid any fears that the advice given to him might not have been up to standard or anything of the sort. His statement was clear that he was contacted by Joe, who at the time of his plea, he had known was a police agent.

[12] It would have been clear to him and his counsel at that stage that the evidence sought to be tendered was from a police trap. All or any defence would have been available to him at that stage, but perhaps the evidence was overwhelming, hence a plea of guilty. As this was a plea of guilty, and after questioning of the appellant, the learned magistrate was satisfied that the evidence or the plea tendered proved the appellant's guilt beyond reasonable doubt. Unlike in *S v Kotzè*,[3] the admissibility of the evidence did not need to be established by the State, as it was never an issue. In *Kotzè,* for instance, the evidence produced that the police agent Terblanche had established a close and friendly relationship with the appellant, Kotzè. This friendship which extended to more than a year was the source of the entrapment. The appellant, on four different occasions, 14 July 2001, 7 September 2001, 14 December 2001 and 10 February 2002 sold (purchased) unpolished diamonds in contravention of s 20 of the Diamonds Act 46 of 1986.

[13] A full trial was held in the Bellville Regional Court. During the course of the trial the admissibility of the evidence of the trap was put at issue and a trial with in trial was held which ruled that evidence as admissible. It was lamented in the judgment that the magistrate failed to request Kotzè at the time to furnish grounds on which he challenged the admissibility of the evidence, as required in s 252A(6) of the Act. In paragraph 20 thereto it was held that the burden of proof to show that the evidence is admissible rests on the prosecution and this

[3] *S v Kotzè* 2010 (1) SACR 100 (SCA) para 20 at 111c – g.

burden must be discharged on a balance of probabilities. Later this was changed to proof beyond reasonable doubt in line with the constitutional presumption of innocence and the constitutional protection of the right to silence. The defence of a trap therefore was never raised by the appellant in this matter prior to his conviction as he had pleaded guilty.

[14] In my reading of the appellant's statement in terms of s 112(2) of the Act I can see no basis for the submission made that the conduct of Joe went further than providing an opportunity to commit the offence. This was a submission and not evidence before the court *a quo*. In my view, this was an afterthought on the part of the new legal representative of the appellant and with a view to delay the sentencing procedure.

[15] Whilst it could be so that the defence of a trap is valid if those involved in the trap went beyond providing an opportunity to commit the offence, in Kotzè it was established that various attempts were made to trap Kotzè, something which does not feature in this matter. Terblanche had also established a close friendship relationship with Kotzè and this could have been construed as exploiting that friendship. I am therefore satisfied that in this case, the provisions of s 252A were satisfied and the magistrate correctly in my view convicted the appellant.

[16] However, having said all the above, Mr *Barnard* submitted that even though the issue of the admissibility of the trap was at issue, namely whether the trap went beyond providing an opportunity, was not evidence before the court *a quo*, the allegation itself was enough to satisfy the requirements required in terms of s 113(1) of the Act. He argued that as the allegation was made prior to the sentencing of the appellant the learned magistrate had no choice but ought to have entered a plea of not guilty. In this regard he referred us to *Mokonotho*

& others v Reynolds NO & another[4] and *Naidoo v De Freitas*[5] as authorities for his propositions.

[17] In *Mokonotho* above, the court held that a mere allegation sufficed for the purposes of s 113 (1). This was brought about by the changes in s 113 which seemed to have intended to remove the requirement of a reasonable doubt and to replace it with a lighter test.[6] The same approach was adopted in *Naidoo* referred to above.[7] As the Magistrate's Court is a creature of statute, it was therefore not open to the learned magistrate to decide that the appellant's defence was reasonable or what was alleged was true or not as that was irrelevant at that stage. The provisions of s 113 are also peremptory. All that suffices was that there was an allegation that the appellant did not admit all the elements of the offences. In such circumstances, the learned magistrate ought to record a plea of not guilty and require the prosecutor to proceed with the trial. We are therefore constrained by the peremptory provisions of s 113(1). Perhaps the provisions of this section ought to be reconsidered by the lawmakers as it can have the unintended consequences of delaying the finalisation of criminal matters which might not be in the interests of justice and at times detrimental to an accused's right to a fair and speedy trial.

Order

[18] Accordingly, I make the following order:

(a) the conviction and sentence of the appellant is set aside on the ground that the provisions of s 113 ought to have been applied;

(b) the matter is remitted back to the Regional Court for the court to act in terms of s 113.

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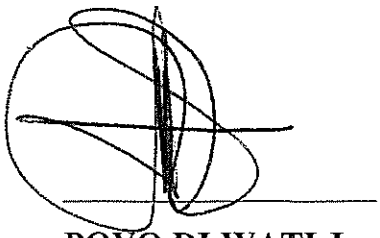
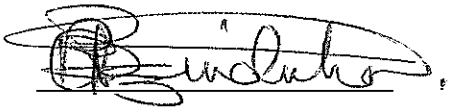
[4] *Mokonotho & others v Reynolds NO & another* 2009 (1) SACR 311 (T) paras 20 and 21.
[5] *Naidoo & another v De Freitas & another* 2013 (1) SACR 284 (KZP) para 8.
[6] *Mokonotho & others v Reynolds NO & another* 2009 (1) SACR 311 (T) para 20.
[7] *Naidoo & another v De Freitas & another* 2013 (1) SACR 284 (KZP) para 8.



POYO DLWATI J

I agree



BEZUIDENHOUT J

APPEARANCES

Date of Hearing	:	15 March 2019
Date of Judgment	:	7 June 2019
Counsel for Appellant	:	Mr Barnard
Instructed by	:	Chetty, Asmall & Maharaj Attorneys
Counsel Respondent	:	Ms Dyasi
Instructed by	:	Director of Public Prosecutions